CHOY MAY MAY & ORS v. PREMA BONANZA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HAYATUL AKMAL ABDUL AZIZ J
[CIVIL SUIT NO: WA-22NCvC-457-06-2021]
28 JUNE 2022

Abstract – *(i) The claimants, purchasers of a housing development, being aggrieved with the executive decision in allowing extension of time of the sale and purchase agreement after ten years had passed, must challenge that decision by way of judicial review under O. 53 of the Rules of Court 2012. The legal and procedural mechanism could not be circumvented or sidestepped; and (ii) The claimants, who elected to execute the settlement agreements with the developer voluntarily, must be deemed to have waived their rights under the Contracts Act 1950 and cannot be allowed to resile from that bargain. It would be abusive and unjust to allow it unless there were legitimate vitiating factors in play.*

CIVIL PROCEDURE: *Summary judgment – Application for – Claim for liquidated ascertained damages – Allegation of late delivery of vacant possession of parcel units and late completion of common facilities – Whether pre-conditions under O. 14 of Rules of Court 2012 satisfied*

CIVIL PROCEDURE: *Striking out – Application for – Whether suit frivolous and vexatious – Whether suit may prejudice, embarrass or delay fair trial of action – Whether suit abuse of court process – Whether claim statute barred – Whether claim unfounded and outside scope of agreement signed by parties – Whether action commenced via wrong mode – Whether should be by way of judicial review – Whether action would unjustly enrich other party – Whether action bona fide – Rules of Court 2012, O. 18 r. 19(1)(b), (c), (d) & O. 92 r. 4*

There were two applications herein: (i) the plaintiffs' application under O. 14 rr. 1 and 2 of the Rules of Court 2012 ('ROC') for summary judgment against the defendant ('encl. 6'); and (ii) the defendant's application under O. 18 r. 19(1)(b), (c) or (d) and O. 92 r. 4 of the ROC to strike out the plaintiffs' writ of summons and statement of claim. The defendant was a developer of a housing project known as The Sentral Residences, KL Sentral ('project'), located on a road which was narrow and mainly congested, which the defendant claimed posed logistical challenges and difficulties for architectural, structural and M&E works, compounded by time constraint to complete the project. Confronted with these challenges, the defendant realised that they could never complete the project within the 36 months' window statutorily provided under the Housing Development (Control and Licensing) Act 1966 and the Housing Development (Control and Licensing)

A Regulations 1989. To mitigate these challenges, before the project was sold to the public, the defendant sought an extension of time ('EOT') from the Ministry of Housing and Local Government ('Ministry'). The Ministry allowed the EOT asked for by a letter signed off by the Controller to amend cls. 25 and 27 of the proposed sale and purchase agreements ('SPA') to 54
B months for delivery of vacant possession of the parcels and completion of the common facilities. The defendant then executed the SPAs with the respective purchasers by pointing out the amended completion period, which was not objected to by them. On the completion of the parcel units in the development, the defendant on several dates in January 2017, issued a formal
C notice of delivery of vacant possession to the respective plaintiffs, giving 14 days from the date of the said notice, for the taking of vacant possession of the individual parcel units. In delivering vacant possession of the parcel units, the defendant claimed to have paid LAD for late delivery computed from the 54 months period to the first, second, third, fifth, sixth, ninth and 12th plaintiffs. The parties entered into a settlement agreement concerning
D the LAD payment as being full and final payment and the said plaintiffs shall not be entitled to make any further claims, demands and/or institute any legal suit or proceedings in respect of the same against the defendant. The defendant claimed that the fourth, seventh, eighth, tenth, 11th, 13th, 15th and 16th plaintiffs were not entitled to any LAD as there was no delay in
E the delivery of vacant possession. Everything was relatively quiet from 2010 (when the EOT was granted) to 2017 (delivery of vacant possession) and thereafter until the Federal Court delivered its decision in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* ('*Ang Ming Lee*'). The plaintiffs argued that based on
F *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Application*, as a general rule, *Ang Ming Lee* had a retrospective effect unless expressly stated otherwise and commenced this civil suit in 2021 to challenge the validity of the EOT. The plaintiffs claimed that the defendant failed, neglected and/or refused to
G honour the LAD for the late delivery of vacant possession of the parcel units and the late completion of common facilities for the period commencing from the expiry of 36 months after the payment of the booking fee to the respective dates of vacant possession of the parcels. The defendant, seeking to strike out the suit, claimed that (i) the plaintiffs' claim *inter alia* was
H statute-barred. The plaintiffs did not explain the delay in the filing of the claim and no extension of time was sought; (ii) the plaintiffs' claim was unfounded, in that, it was outside the scope of the SPA signed by the parties; (iii) the challenge of the EOT was in the realm of public law; (iv) the plaintiffs commenced the action in the wrong mode, which should have been by judicial review, and the plaintiffs failed to satisfy the three-month period
I to file a judicial review application; (v) the plaintiffs failed to particularise

their loss/damages; (vi) the plaintiffs knew of the 54 months and consented to the same; (vii) the plaintiffs' filing of a class action herein was erroneous; and (viii) the plaintiffs' action was to unjustly enrich themselves and lacked *bona fid*e.

Held (dismissing encl. 6; allowing encl. 7):

(1) The issues between the parties were completed and perfected since 2017 and fuelled by the prospect of unexpected substantial financial rewards (LAD) to be extracted from the defendant. In the circumstances, they were aggrieved with the executive decision allowing the EOT in cls. 25 and 27 of the SPAs after ten years had passed. Therefore, they must challenge that decision to quash it by way of judicial review under O. 53 of the ROC by seeking an abridgment of time under O. 53 r. 3(7) of the ROC. That legal and procedural mechanism could not be circumvented or sidestepped. Since the EOT was interlocked with the variation in the impugned clauses, it predominantly involved public law issues. The heart of the plaintiffs' argument hinged on the said EOT. It had to be quashed and not evasively by this civil action seeking declaratory orders rendering judicial review meaningless in the circumstances. When the wrong mode is used as in the present action, it must, as a matter of course, be struck off. (para 24)

(2) It was sufficient to determine at this juncture that encl. 6 was obviously untenable and must be dismissed. However, encl. 7, grounded on *inter alia*, abuse of process satisfied the *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* and should be allowed. The action was, in the circumstances, obviously unsustainable. (para 27)

(3) The plaintiffs' claim was also barred by limitation. The plaintiffs failed to comply with the requirements of a representative action in O. 15 r. 12 of the ROC that where numerous persons have the same interest in any proceedings, the proceeding may be begun by or against any one or more of them. In the present suit, the plaintiffs had entered into separate SPAs. Therefore, none of them could represent each other in their contracts even if the agreements were similar. There was also no indication in the intitule or body of this suit that was intended as a representative action which in this case would be fatal. (para 28)

(4) The plaintiffs who had elected to execute the settlement agreements or letters with the defendant voluntarily must be deemed to have waived their right under the Contracts Act 1950 and could not be allowed to resile from that bargain. It would be abusive and unjust in the circumstances to allow it unless there were legitimate vitiating factors in play. (para 28)

(5) The plaintiffs had failed to prove their case and the defendant had shown satisfactorily to the court a meritorious defence to this suit. For the striking out application, the court found for the defendant and in coming to that conclusion, the court was minded of the legal position that the suit must be hopeless, baseless or without foundation in law or equity or otherwise an abuse of the process of the court before it could be struck out. This suit by the plaintiffs was obviously unsustainable and was ordered to be struck out against the defendant. (para 29)

Case(s) referred to:

Abillah Labo Khan v. PP [2002] 3 CLJ 521 CA ***(refd)***

Ace Polymers (M) Sdn Bhd v. Ketua Pengarah Lembaga Kemajuan Ikan Malaysia & Ors [2012] 8 CLJ 440 HC ***(refd)***

Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 1 LNS 114 HC ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Alias Ismail v. Hairuddin Mohamad & Anor [1997] 4 CLJ 669 CA ***(refd)***

Alpine Return Sdn Bhd v. Matthew Ng Hock Sing & Ors [2022] 1 CLJ 120 HC ***(refd)***

Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Application [2020] 6 CLJ 55 HC ***(refd)***

Amazing Place Sdn Bhd v. Couture Homes Sdn Bhd & Anor [2010] 1 LNS 823 HC ***(refd)***

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

Arab-Malaysian Finance Bhd. v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Associated Pan Malaysia Cement Sdn Bhd v. Sykt Teknikal & Kejuruteraan Sdn Bhd [1990] 2 CLJ 913; [1990] 1 CLJ (Rep) 15 SC ***(refd)***

Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors [1985] 2 CLJ 11; [1985] CLJ (Rep) 37 SC ***(refd)***

Badan Pengurusan Bersama Mahkota Parade v. Pesuruhjaya Bangunan Majlis Bandaraya Melaka Bersejarah [2016] 1 LNS 1080 HC ***(refd)***

Badat Drani v. Tan Kheat [1953] 1 LNS 6 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals [2009] 6 CLJ 22 CA ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Birmingham Corporation v. West Midland Baptist (Trust) Association (Inc) [1969] 3 All ER 172 ***(refd)***

Birmingham Land Company v. London And North Western Railway Company [1886 B.571], (1888) 40 Ch D 268 ***(refd)***

Bludream City Development Sdn Bhd v. Kong Thye & Ors And Other Appeals [2022] 2 CLJ 829 CA ***(refd)***

Bousteadt Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 3 MLJ 331 CA ***(refd)***

Calvin v. Carr [1979] 2 All ER 440 ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***
Chan Kwai Chun v. Lembaga Kelayakan [2002] 3 CLJ 231 CA ***(refd)***
Choong Mee Leng v. Lam Chong Seng [2005] 3 CLJ 350 CA ***(refd)***
Cotra Enterprises Sdn Bhd v. Pakatan Mawar (M) Sdn Bhd [2001] 7 CLJ 261 HC ***(refd)***
Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia [2007] 4 MLJ 422 ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Duke Of Bedford v. Ellis [1901] AC 1 ***(refd)***
Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***
Faber Union Sdn Bhd v. Chew Nyat Shong & Anor [1995] 3 CLJ 797 SC ***(refd)***
Fairmount Investments Ltd v. Secretary Of State For The Environment [1976] 2 All ER 865 ***(refd)***
Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***
Hadi Hassan v. Suria Records Sdn Bhd & Ors [2004] 8 CLJ 225 HC ***(refd)***
Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***
Hedgeford Sdn Bhd v. Sri Gananatha Sivanathan & Ors [2018] 1 LNS 1497 HC ***(refd)***
Hoo See Sen & Anor v. Public Bank Bhd & Anor [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 SC ***(refd)***
Inchcape (M) Holdings Bhd v. RB Gray & Anor [1985] 2 CLJ 305; [1985] CLJ (Rep) 132 SC ***(refd)***
Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***
Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Jalang Paran & Anor v. Government Of The State Of Sarawak & Anor [2011] 3 CLJ 469 CA ***(refd)***
Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***
Ketua Pengarah Kastam Dan Eksais v. Coach Malaysia Sdn Bhd [2019] 4 CLJ 454 CA ***(refd)***
Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v. Liew Choong Kin [2018] 6 CLJ 217 CA ***(refd)***
L'estrage v. F Graucob [1934] 2 KB 394 ***(refd)***
Lam Su See v. Prema Bonanza Sdn Bhd [2021] 1 LNS 625 HC ***(refd)***
Lee Poh Choo v. S.E.A Housing Corporation Sdn Bhd [1981] 1 LNS 25 ***(refd)***
Leong Keng Chiang v. Prema Bonanza Sdn Bhd [2021] 1 LNS 659 HC ***(refd)***
Letchumanan Chettiar Alagappan (As Executor To Sl Alameloo Achi (Deceased) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***
Linkletter v. Walker [1965] 381 US 618 ***(refd)***
London & Clydeside Estates Ltd v. Aberdeen District Council [1980] 1 WLR 182 ***(refd)***
Maharaj v. National Energy Corporation of Trinidad and Tobago [2019] 2 LRC 693 ***(refd)***
Majlis Perubatan Malaysia & Anor v. Asia Pacific Higher Learning Sdn Bhd [2019] 5 CLJ 513 CA ***(refd)***
Markt & Co Ltd v. Knight Steamship Co Ltd [1910] 2 KB 2012 ***(refd)***
Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors [2010] 1 LNS 370 HC ***(refd)***
Muhammad Zamri Vinoth Kalimuthu v. Arumugam Dorasamy [2021] 1 LNS 1229 HC ***(refd)***

A *Muniandy Subrayan & Ors v. Chairman And Board Members, Koperasi Menara Maju Bhd [1997] 1 CLJ 417 CA* ***(refd)***
Nadefinco Ltd v. Kevin Corporation Sdn Bhd [1978] 1 LNS 127 FC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***
B *Ng Kian Chong & Ors v. Saw Seng Kee [1994] 4 CLJ 857 HC* ***(refd)***
Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Another Appeal [2022] 5 CLJ 251 CA ***(refd)***
Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases [2021] 10 CLJ 596 HC ***(refd)***
C *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor [2015] 2 CLJ 252 CA* ***(refd)***
Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors [1986] 1 LNS 124 HC ***(refd)***
Parkson Corp Sdn Bhd v. Fazaruddin Ibrahim (t/a Perniagaan Fatama) & Another Appeal [2011] 2 MLJ 46 CA ***(refd)***
D *Pen Apparel Sdn Bhd v. Leow Chooi Khon & Ors [1995] 4 CLJ 606 HC* ***(refd)***
Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Mohd Sobri Che Hassan [2020] 1 CLJ 595 FC ***(refd)***
PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
E *PP v. Hue An Li [2014] 4 SLR 661* ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
QB Khidmat Teguh Sdn Bhd v. Pembinaan Legenda Unggul Sdn Bhd & Anor [2016] 1 LNS 1447 HC ***(refd)***
R v. Paddington Valuation Officer; ex parte Peachy Property Corp [1966] 1 QB 380 ***(refd)***
Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd
F *[1993] 3 CLJ 606 SC* ***(refd)***
Re Spectrum Plus Ltd; National Westminster Bank plc v. Spectrum Plus Ltd and Others [2005] UKHL 41 ***(refd)***
Re Tong Tai Holdings Sdn Bhd [2003] 6 CLJ 170 HC ***(refd)***
Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia [2009] 1 CLJ 192 CA ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***
G *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC* ***(refd)***
Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***
H *Shahizul Helmi Sharani v. Angkatan Tentera Malaysia & Ors [2017] 1 LNS 1005 CA* ***(refd)***
Sim Siok Eng v. Government Of Malaysia [1977] 1 LNS 116 FC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Small Holders Corp Sdn Bhd & Anor v. Utusan Transport Sdn Bhd [1995] 1 LNS 223 HC ***(refd)***
I *South East Asia Insurance Bhd v. Kerajaan Malaysia [1998] 1 CLJ 1045 CA* ***(refd)***
Sri Damansara Sdn Bhd v. Voon Kuan Chien & Anor [2020] 5 CLJ 619 CA ***(refd)***

Sundram Ramasamy v. Arujunan Arumugam & Anor [1994] 4 CLJ 300 SC ***(refd)***
Superintendent Of Lands And Surveys, Samarahan Division & Anor v. Abas Naun & Ors And Another Appeal [2015] 1 CLJ 18 FC ***(refd)***
Tahan Steel Corp Sdn Bhd v. Bank Islam Malaysia Bhd [2005] 1 SHLR 117 ***(refd)***
Tan Ah Tong v. Parveen Kaur [2012] 10 CLJ 159 CA ***(refd)***
Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd Intervener) [1995] 2 CLJ 846 HC ***(refd)***
Tan Poh Yee v. Tan Boon Thien & Other Appeals [2017] 3 CLJ 569 CA ***(refd)***
Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals [2018] 9 CLJ 425 FC ***(refd)***
Tarlia Enterprises Sdn Bhd v. Ng Giak Pin [2020] 1 LNS 2219 HC ***(refd)***
The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***
The State Government Of Sabah & Ors v. Clarence Chiuh Ken Loong & Ors [2017] 2 CLJ 379 CA ***(refd)***
Thomas Huges Appellant; And The Directors, & C., Of The Metropolitan Railway Company Respondents (1877) 2 App Cas 439 ***(refd)***
TR Rumah Lampoh Dana & Ors v. Government Of Sarawak [2005] 8 CLJ 705 HC ***(refd)***
Trace Consultant Services Sdn Bhd v. Koperasi Mahadaya Bhd & Anor [2013] 1 LNS 112 HC ***(refd)***
United Asian Bank Bhd v. Elgi Marka Sdn Bhd [1995] 1 CLJ 407 HC ***(refd)***
UNP Plywood Sdn Bhd v. HSBC Bank Malaysia Bhd [2010] 5 CLJ 177 CA ***(refd)***
Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC ***(refd)***
Vignesh Naidu Kuppusamy Naidu v. Prema Bonanza Sdn Bhd [2021] 1 LNS 2551 HC ***(refd)***
Voon Keng & Ors v. Sykt Muzwina Development Sdn Bhd [1990] 1 CLJ 1010; [1990] 3 CLJ (Rep) 329 HC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***
Yahya Kassim v. Kerajaan Malaysia & Anor [1998] 1 CLJ 43 CA ***(refd)***
Yong Seng Yeow v. Indah Water Konsortium Sdn Bhd [2010] 3 CLJ 711 CA ***(refd)***
Yugarajan Letchimanasamy & Anor v. PP & Another Appeal [2020] 7 CLJ 372 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 64
Criminal Procedure Code, s. 418A
Dangerous Drugs Act 1952, s. 37A
Evidence Act 1950, ss. 91, 92
Federal Constitution, arts. 5(1), 8(1)
Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), (2), (3), Schedule H cls. 25(1), (3), 27(3), 29(1)
Land Acquisition Act 1960, s. 40D
Limitation Act 1953, s. 6(1)(a)
Rules of Court 2012, O. 14 rr. 1, 2, O. 15 r. 12, O. 18 rr. 12, 19(1)(a), (b), (c), (d), O. 53 rr. 1, 2, 3(7), O. 92 r. 4

For the plaintiffs - Jadadish Chandra; M/s Arbain & Co
For the defendant - Lai Chee Hoe & Shelby Ngeow; M/s Chee Hoe & Assocs

Reported by Lina E

A

JUDGMENT
(encls. 6 and 7)

Hayatul Akmal Abdul Aziz J:

[1] There are two applications by the parties before me:

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(i) Enclosure 6: The plaintiffs' application under O. 14 r. 1 and r. 2 Rules of Court 2012 ("ROC 2012") for summary judgment against the defendant and other related prayers; and

(ii) Enclosure 7: The defendant's application under O. 18 r. 19(1)(b), (c) or (d) and O. 92 r. 4 ROC 2012 to strike out the plaintiff's writ of summons and the statement of claim dated 29 June 2021.

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[2] On 28 April 2022, the above applications were heard before me, and after hearing the submissions of counsels, I made the following decisions:

(i) Enclosure 6: Is dismissed with costs of RM5,000 to be paid within 14 days; and

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(ii) Enclosure 7: Order in terms of prayers 1 and 2 with global costs of RM5,000 to be paid within 14 days.

Dissatisfied, the plaintiffs appealed against both decisions. My findings will be separated into two parts, *ie*, Part (A) for encl. 6 and Part (B) for encl. 7, in a single judgment to avoid unnecessary repetition since it involves similar facts.

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[3] The relevant cause papers and written submissions, which I have segregated according to the respective applications, are:

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(i) Writ of summons and statement of claim dated 29 June 2021 (encls. 70 1 and 2); and

(ii) Defendant's statement of defence dated 3 August 2021 (encl. 5).

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Part (A)

Enclosure 6: O. 14 r. 1 And r. 2 ROC 2012

(i) Notice of application dated 21 September 2021 (encl. 6);

(ii) Plaintiffs' affidavit in support affirmed by Tung Lee Yoon on 21 September 2021 (encl. 6);

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(iii) Defendant's affidavit in reply affirmed by Wong Hong Yeong on 6 October 2021 (encl. 12);

(iv) Plaintiffs' affidavit in reply affirmed by Tung Lee Yoon on 18 October 2021 (encl. 13); and

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Submissions of the respective parties.

Part (B)

Enclosure 7: O. 18 r. 19(1)(b), (c) And (d) And O. 92 r. 4 ROC 2012

(i) Notice of application dated 21 September 2021 (encl. 7);

(ii) Defendant's affidavit in support affirmed by Wong Hong Yeong on 21 September 2021 (encl. 8);

(iii) Plaintiffs' affidavit in reply affirmed by Tung Lee Yoon 5 October 2021 (encl. 11);

(iv) Defendant's affidavit in reply two affirmed by Wong Hong Yeong on 20 October 2021 (encl. 14); and

Submissions of the respective parties.

Brief Facts

[4] The brief facts gathered from the cause papers and submissions in a nutshell are:

(i) The defendant is a developer of a housing project known as The Sentral Residences, KL Sentral ("the project"), which comprises, amongst others, service apartments identified as Tower A and Tower B, respectively, consisting of a 55-story twin tower connected by a sky-bridge that contains a total of 752 units, located in the proximity of Damansara/Travers main road which is narrow and mainly congested, which the defendant claimed posed logistical challenges and difficulties for architectural, structural and M & E works, compounded by time constraint to complete the project (with the DBKL guideline at the time that only allowed construction from eight to 20 hrs daily);

(ii) Confronted with these challenges, the defendant realised that they could never complete the project within the 36 months window statutorily allowed under the statute (HDA 1966 and HDR 1989);

(iii) Therefore, to mitigate these said challenges, before the said project was sold to the public, as allowed under the HDA 1966 and the HDR 1989, the defendant formally wrote to the Ministry of Housing and Local Government (on 14 May 2008, 10 August 2009 and 15 November 2010: encl. 10, pp. 44 to 49) seeking an extension of time (EOT) on the 36 months imposed in the statutory sales and purchase agreement (Schedule H: HDR 1989), by highlighting to the Minister, the complexities and difficulties they faced in undertaking the said project;

(iv) On 16 December 2010, the Ministry of Housing and Local Government, with the permission of the Minister at the time (reg. 11(3) HDR 1989), allowed the extension of time asked for by a letter signed off by the Controller (by his officer) (encl. 12, p. 39), to amend cls. 25 and 27 of the proposed sales and purchase agreement (SPA: Schedule H: Regulation 11(1) HDR 1989) by substituting instead of 36 months to 54 months for delivery of vacant possession of the parcels, and completion of the common facilities;

(v) Anchored with this approval by the Ministry, only then did the defendant execute the SPAs with the respective purchasers by pointing out the amended completion period in cls. 25 and 27, which was not objected to buy them;

(vi) At no time were any SPAs executed with any party(s) before the amendment for the EOT was formerly allowed by the Ministry, and with the SPA amended accordingly;

(vii) The defendant claimed that in accepting the consideration from the plaintiffs, it was always subject to a delivery period of 54 months and not 36, as reflected in the SPAs and the selling price, which would have been otherwise higher. In making an offer to purchase, the plaintiffs at large wanted to enjoy the benefits of pre-selecting units which offered the best views and floor and had delivered to the defendant a written offer to purchase their selected parcel units with a validity of six months for the defendant to accept the said offer to purchase. These letters of offer were accompanied by a booking fee paid into the account of various solicitors, acting for the intended purchasers (plaintiffs) as stakeholders even before the execution of the SPA. None of the said booking fees were paid into the defendant's account. Subsequently, the defendant informed the relevant stakeholders and the intended purchasers that it had accepted their offer with discounts offered (credit notes issued: encl. 35, pp. 14 to 32) to purchase and proceeded with the respective SPAs. Knowing the completion period was now 54 months and not 36, all the plaintiffs elected to proceed with executing the SPAs. For convenience, I have prepared the table, setting out the SPA dates, the booking date, the purchase price, the actual price paid after rebate, notice of vacant possession, date of deemed vacant possession, completion date of common facilities, and the claimed liquidated ascertained damages ("LAD") from the date of the booking fees by the plaintiffs, as follows:

Plf No	Date of Booking fee	Date of SPA	Purchase Price stated in the SPA (RM)	Actual Purchase Price paid by the Plaintiffs (after discount)	Notice of Vacant Possession	Date of Deemed Vacant Possession	Completion of Common Facilities	The claim for LAD calculated from date of Booking Fee paid the by Plaintiffs (RM)
P1	22.09.2011	18.7.2012	1,596,000.-	1,516,200.-	23.1.2017	6.2.2017	6.1.2017	439,883.83
P2	29.08.2011	25.7.2012	1,604,000.-	1,523,800.-	25.1.2017	8.2.2017	6.1.2017	457,996.93
P3	15.09.2011	11.7.2012	1,280,000.-	1,241,600.-	25.1.2017	8.2.2017	6.1.2017	353,420.27
P4	30.01.2013	14.2.2013	1,811,000.-	1,720,450.-	25.1.2017	8.2.2017	6.1.2017	215,533.81
P5	07.09.2011	11.7.2012	1,322,000.-	1,282,340.-	2.2.2017	16.2.2017	6.1.2017	369,073.42
P6	12.09.2011	25.7.2012	1,680,000.-	1,596,000.-	25.1.2017	8.2.2017	6.1.2017	471,964.93
P7 P8	10.04.2013	14.6.2013	2,059,000.-	1,956,050.-	2.2.2017	16.2.2017	6.1.2017	222,033.53
P9	15.09.2011	18.7.2012	1,593,000.-	1,516,350.-	23.1.2017	6.2.2017	6.1.2017	442,723.07
P10 P11	20.01.2013	31.1.2013	2,137,000.-	2,030,150.-	23.1.2017	6.2.2017	6.1.2017	309,835.73
P12	03.09.2011	19.7.2012	1,944,000.-	1,788,480.-	23.1.2017	6.2.2017	6.1.2017	548,474.30
P13	17.10.2012	24.12.2012	1,824,000.-	1,732,800.-	23.1.2017	6.2.2017	6.1.2017	278,847.12
P14	03.05.2012	3.10.2012	2,099,000.-	1,921,080.-	2.2.2017	16.2.2017	6.1.2017	443,032.76
P15	22.03.2013	22.3.2013	1,456,000.-	1,368,640.-	25.1.2017	8.2.2017	6.1.2017	155,093.92
P16	11.03.2013	11.3.2013	1,469,000.-	1,380,860.	23.1.2017	6.2.2017	6.1.2017	161,791.24

(viii) On the completion of the parcel units in the development, the defendant, on several dates in January 2017, issued a formal 'notice of delivery of vacant possession' to the respective plaintiffs, giving 14 days from the date of the said notice, for the taking of vacant possession of the individual parcel units. In default thereof, as covenanted by the parties in their respective SPAs (deeming provision), it shall be deemed to have occurred at the expiry of the 14 days.

(ix) In delivering vacant possession of the parcel units, the defendant claimed to have paid LAD for late delivery computed from the 54-month period to the first, second, third, fifth, sixth, ninth, and 12th plaintiffs under cl. 25(2) of the SPA calculated on a day-to-day basis at the rate of ten per centum (10%) per annum of the purchase price. Parties entered into a settlement agreement concerning the said LAD payment as being full and final payment and that the said plaintiffs shall not be entitled to make any further claims, demand, and/or institute any legal suit or proceedings in respect of the same against the defendant (encl. 8, pp. 447 to 468). As for the fourth, seventh, eighth,

tenth, 11th, 13th, 14th, 15th and 16th plaintiffs, the defendant claimed by its computation that they are not entitled to any LAD as there is no delay in the delivery of vacant possession of the parcel units and common properties under the terms of the SPAs with the EOT in place.

(x) Everything was relatively quiet from 2010 (when the Minister granted the EOT) to 2017 (delivery of vacant possession) and thereafter until the Federal Court delivered its decision in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281 FC, that had ruled:

(a) The administrative power conferred under s. 24 of the Housing Development (Control and Licensing) Act 1966 ("HDA 1966") rests with the Minister of Urban Wellbeing, Housing and Local Government ("Minister") to determine the applicable terms and conditions of the SPA and was, therefore, non-delegable to the Controller;

(b) Construing the said s. 24 strictly renders reg. 11(3) *ultra vires* the HDA 1966, and therefore, the Controller of the National Housing Department (Jabatan Perumahan Negara) ("Controller") has no lawful authority to waive or modify any provision in the statutorily prescribed SPAs under Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ("HDR 1989"); and

(c) That power only resides with the Minister, and only the Minister can exercise the discretion to grant an EOT and not the Controller: *Bludream City Development Sdn Bhd v. Kong Thye & Ors And Other Appeal*s [2022] 2 CLJ 829; [2022] 2 MLJ 241.

The plaintiffs argued, based on *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Application* [2020] 6 CLJ 55; [2020] 10 MLJ 689, HC, that as a general rule *Ang Ming Lee*, FC had a retrospective effect unless expressly stated otherwise, and commenced this civil suit in 2021 to challenge the validity of the said EOT.

(xi) The plaintiffs claimed that the defendant failed, neglected, and/or refused to honour the LAD for the late delivery of vacant possession of the parcel units and the late completion of common facilities for the period commencing from the expiry of 36 months after the payment of the booking fee to the respective dates of vacant possession of the parcel which now forms the basis of their claim and prayed for:

(a) A Declaration that Clause 25(1) of the Plaintiffs' respective SPAs in so far as the same states the time for delivery of vacant possession to be fifty-four (54) months from the date of this Agreement is unlawful, illegal and/or null and void in that it contravenes Regulation 11 and Clause 25(1) of Schedule H, of the Housing Development (Control and Licensing) Regulations 1989; and

(b) A Declaration that Clause 27(1) of the Plaintiffs' respective SPAs in so far as the same states the time for delivery of common facilities to be fifty-four (54) months from the date of this Agreement is unlawful, illegal, and/or null and void in that it contravenes Regulation 11 and Clause 27(1) of Schedule H, of the Housing Development (Control and Licensing) Regulations 1989; and

(c) A Declaration that the Defendant breached Regulation 11(2) of the Housing Development (Control and Licensing) Regulations 1989 in collecting and/or receiving Booking Fee from the respective Plaintiffs; and

(d) In the case of the 1st-14th Plaintiffs, an Order that the Defendant pay Liquidated Ascertained Damages commencing from the expiry of thirty-six (36) months from the respective date of payment of the Booking Fee to the date of delivery of vacant possession of the parcel and completion of common facilities, as computed and set out in the Table in (e) below and the respective Annexures (attached hereto);

(e) For the 15th and 16th Plaintiffs, an Order that the Defendant pay Liquidated Ascertained Damages commencing from the expiry of thirty-six (36) months from the respective date of the SPA to the date of delivery of vacant possession of the parcel and completion of common facilities, as computed and set out in the table below and the respective Annexures (attached hereto);

(f) Interest at the rate of 5% per annum on the judgment sum from the date of filing this Writ to the date of full realization; and

(g) Costs; and

(h) Any other relief deemed just and reasonable by this Honourable Court.

(xii) In prosecuting this civil suit, the plaintiffs propose to summarily sign a final judgment against the defendant under O. 14 r. 1 and r. 2 ROC 2012 in encl. 6, based on their assertions that the defendant does not have a defence on merit or triable issue before the court. While on the other hand, the defendant seeks to summarily strike out this suit under O. 18 r. 19(1)(b), (c) or (d) and O. 92 r. 4 ROC 2012 in encl. 7, premised on the argument that it is scandalous, frivolous, or vexatious and an abuse of process, its time-barred, and otherwise an abuse of process. The defendant prayed in encl. 7 for:

(1) Bahawa Writ Saman dan Pernyataan Tuntutan Plaintif-Plaintif bertarikh 29.6.2021 terhadap Defendan dibatalkan;

(2) Bahawa kos permohonan ini ditanggung oleh Plaintif-Plaintif; dan,

(3) Apa-apa perintah dan/atau relif lain yang dianggap sesuai dan adil oleh Mahkamah yang Mulia ini.

I had directed parties that both enclosures would be heard together to save time.

Part A:

Enclosure 6: Summary Judgment By The Plaintiffs

Submissions By The Plaintiffs

[5] In support of their summary judgment application, the plaintiffs cited *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300, FC, where the Federal Court has set out the requirements for an application under O. 14:

> For the purposes an application under Order 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.

The plaintiffs argued that they are claiming for LAD for delayed delivery of vacant possession, and the several declarations in their encl. 6 are within the ambit of O. 14 r. 1 and r. 2 ROC 2012. They asserted that they had satisfied all legal requirements for summary judgment and *prima facie* should be allowed to record a final judgment on its several prayers if the defendant cannot show defence on merits in opposing this claim. *Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors* [1985] 2 CLJ 11; [1985] CLJ (Rep) 37; [1985] 2 MLJ 209, SC was cited where the Supreme Court allowed a declaration sought in that case.

[6] Anchored on *Ang Ming Lee*, FC, (*supra*), the 54 months delivery period instead of the original 36 months for the parcel units and the common facilities stated in cls. 25 and 27 of the SPA cannot hold, and must be corrected. They asserted that though *Ang Ming Lee*, FC, (*supra*) did not expressly state that the decision had a retrospective effect on its face, but they argued that there is nothing in the judgment to say otherwise. In support, they cited *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Application* [2020] 6 CLJ 55; [2020] 10 MLJ 689, HC, in relation to the question of retrospectivity of *Ang Ming*

Lee, FC, the learned High Court Judge, in that case, had opined that the said FC ruling had a retrospective effect. In the circumstances, the plaintiffs argued that this court should subscribe to the same belief. Any departure from this or the principles in *Ang Ming Lee*, FC would pose significant prejudice to the plaintiffs, and the provisions in the HDA 1966 and HDR 1989 would be severely compromised.

[7] The plaintiffs further argued that:

(i) Their cause of action is not a class action in breach of O. 15 r. 12 ROC 2012 as alleged by the defendant, though clearly, this suit comprises 16 plaintiffs with 16 separate SPAs entered individually by them, with no representative nomination in the intitule or body of the suit;

(ii) The invalidity of cls. 25 and 27 herein in the respective SPAs did not render it null, void, or of no effect as claimed by the defendant. The invalidity is only to the extent it is unlawfully amended or varied without nullifying the respective SPAs. In the present case, the EOT was signed off by the Controller (by his officer) and not the Minister as required: *Bludream City Development Sdn Bhd v. Kong Thye & Ors And Other Appeals* (*supra*);

(iii) The plaintiffs are within their legal rights to seek redress for the LAD from the defendant brought about by the unlawful variation of cls. 25 and 27 to 54 months instead of 36 on the parcel units and common facilities;

(iv) Since the SPA is a statutory contract under Schedule H, HDR 1989, the defendant is not allowed to depart from the standardised format as approved by the statute unless legitimately permitted by the statute;

(v) Their suit is not barred by limitation (s. 6(1)(a) Limitation Act 1953) as claimed by the defendant, as the cause of action is founded on a contract between the parties. The contractual entitlement of the plaintiffs arises from the date of the delivery of vacant possession, as stated in cls. 25(3) and 27(3) of the respective SPAs. In *Leong Keng Chiang v. Prema Bonanza Sdn Bhd* [2021] 1 LNS 659; [2021] MLJU 714, HC; *Lam Su See v. Prema Bonanza Sdn Bhd* [2021] 1 LNS 625; [2021] MLJU 713, HC, held that claim for LAD commences when the purchaser takes delivery of vacant possession;

(vi) They further argued that the mode of action taken by the plaintiffs (this civil suit) as opposed to a judicial review to challenge the EOT is the correct approach since the said EOT is obtained by a void administrative decision, it is rendered void *ab initio.* Consequently, there is no executive decision to challenge: *Leong Keng Chiang v. Prema Bonanza Sdn Bhd* (*supra*);

(vii) Neither is this civil suit premature as alluded to by the defendant. The defendant is not prejudiced by the non-inclusion of the Ministry of Housing and Local Government as a co-defendant or as a third party herein. The defendant can take a separate suit to seek damages against the Ministry for its unlawful action. This is an action to challenge the validity of the variation to cls. 25 and 27 of the SPA and not to challenge the Controller that had signed off on approval to amend the said clauses;

(viii) The use of the settlement letters/agreement to deny this claim by the defendant is untenable. The said letters are premised on the computation of LAD based on 54 months, whereas the claim herein is based on a calculation of 36 months. There is no issue of the duplicity of the claim as argued by the defendant. The defendant cannot rely on the waiver in those letters or estoppel to halt this action. The defendant cannot assume that the plaintiffs had foregone their right to claim in the circumstances. This is a right under a statute, and there can be no estoppel against a statute: *Lam Su See v. Prema Bonanza Sdn Bhd* (*supra*); *Hedgeford Sdn Bhd v. Sri Gananatha Sivanathan & Ors* [2018] 1 LNS 1497; [2018] MLJU 1424, HC. The Court of Appeal in *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252; [2014] MLJU 1932, CA reaffirmed the position that the LAD provision in a SPA: Schedule H cannot be contracted out. See also *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618; [2008] 4 MLJ 852, CA; *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141, FC. Therefore, the substitution of the period of 36 months to 54 months is invalid. The plaintiffs are entitled to claim LAD computed from the completion of the 36 months taken at the date of the booking fee until the delivery of vacant possession. The contention by the defendant that the plaintiffs' action herein is merely to enrich themselves unjustly cannot hold: *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441; [2021] 2 MLJ 60, FC. The issue raised by the defendant on the discounts granted on the sales price to the plaintiffs cannot arise in the computation of the LAD since the law only provides for the sale and purchase price as a benchmark and not that of a discounted price: *Sri Damansara Sdn Bhd v. Voon Kuan Chien & Anor* [2020] 5 CLJ 619; [2020] 4 MLJ 265, CA;

(ix) The plaintiffs argued that the EOT by the Controller had denied the purchasers' right to claim for LAD, and this has prejudiced the purchasers in not protecting the interest of purchasers as intended by the Parliament. It is inconsequential whether the defendant obtained the EOT before or after the signing of SPA because the EOT obtained by the defendant is unlawful and void *ab initio*: *Leong Keng Chiang v. Prema Bonanza Sdn Bhd* (*supra*);

(x) In *Sri Damansara Sdn Bhd v. Voon Kuan Chien & Anor* [2020] 5 CLJ 619; [2020] 4 MLJ 265, CA, the Court of Appeal held that reg. 11(2) HDR 1989 prohibits the collection of any prior payment before the signing of the SPA. The plaintiffs submit that the defendant, as a housing developer, is prohibited from collecting any payment before the signing of SPA as they had done. The Federal Court in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* (*supra*), observed that the law prohibits the developers from taking booking fees; and

(xi) The computation of the period of 36 months runs from the date of the booking fee regardless of the date of the SPA: *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125; [1988] 2 MLJ 170; *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797; [1995] 2 MLJ 597, SC; *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* (*supra*). The plaintiffs do not have to particularise their losses or damages since the SPA is a statutory contract with a formula for computation already built-in: *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618; [2008] 4 MLJ 852, CA.

[8] In the premise, the plaintiffs pray for order in terms of encl. 6 with costs against the defendant.

Submissions By The Defendant

[9] The defendant argued that it has a meritorious defence and serious issues to be tried, making summary judgment for the plaintiffs untenable. In a nutshell, the defendant contends against the plaintiffs on the issue of limitation; LAD outside the scope of the SPA; wrong mode of process; class action; failure to particularise damages or losses; estoppel; premature and an abuse of process; non-joinder of a party; unjust enrichment; and non-retrospective effect of *Ang Ming Lee*, FC, (*supra*). The principles governing summary judgment are settled; if there is a meritorious defence or triable issues, summary judgment cannot be granted: *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544; [2006] 2 MLJ 685, FC. The defendant merely needs to show a triable issue and not a complete defence: *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400, SC. An O. 14 application cannot be used to shut out a defendant: *Yong Seng Yeow v. Indah Water Konsortium Sdn Bhd* [2010] 3 CLJ 711, CA.

[10] The defendant further submitted that:

(i) The claim by the plaintiffs is barred by limitation s. 6(1)(a) Limitation Act 1953. The cause of action arises from the SPAs between the parties. Looking at the SPA of the plaintiffs executed between 2012 to 2013, the limitation would have set in as early as 9 July 2018 and

24 July 2018. Time runs from the date of the alleged breach of the SPA: *The Great Eastern Life Assurance Co. Ltd. v. Indra Janardhana Menon* [2005] 4 CLJ 717; [2006] 2 MLJ 209, FC. In *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, SC, it was observed by the Supreme Court that a cause of action is a statement of facts alleging that a plaintiff's right, either by law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of the defendant in an action. It was ruled much earlier by the Federal Court in *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, FC that the right to bring an action may arise on various events, but the statute runs from the earliest time at which an action could be brought to address the breach or infringement. See also the Federal Court in *Nadefinco Ltd v. Kevin Corporation Sdn Bhd* [1978] 1 LNS 127; [1978] 2 MLJ 59, FC, that ruled that time must run from the date of the default. In the present case, the plaintiffs have offered no explanation for the delay in this action or why time should be enlarged in the circumstances. The burden lies on the plaintiffs in the present case to show that the action is commenced within time, or else the suit should be struck off. The Court of Appeal agreed with the findings of the High Court in a similar fact case in *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Another Appeal* [2022] 5 CLJ 251, when it held that the plaintiff was essentially disputing the validity of the SPA, and hence the cause of action runs from the date of execution of the SPAs. Consequently, the claim herein clearly falls outside the limitation period since the SPA was entered between July 2012 to June 2013:

> [25] We would agree with the Plaintiff/Appellant if the Plaintiff's claim for LAD is simply based on clauses 25 and 27 of the SPAs, where the delivery period of the Properties was agreed/ contracted at fifty-four (54) months.
>
> [26] However, the Plaintiff's claim herein is not based on clauses 25 and 27 of the SPAs, which the parties have signed …
>
> [29] Therefore, in gist, on its pleaded case, the Plaintiff's cause of action is that:
>
> (i) that the SPAs were invalid at the time of signing, as the SPAs had failed to comply with the prescribed Schedule H; and
>
> that the Defendant has breached Schedule H of the HDR 1989 by amending the time delivery of vacant possession from thirty-six (36) months to fifty-four (54) months…
>
> [33] In other words, the Plaintiff is challenging the validity of both clauses 25 and 27 of the SPAs from the date of the signing/ execution of the SPAs. This challenge is premised on a breach of Schedule H of the HDR 1989, as interpreted by the Federal Court in *Ang Ming Lee* (*supra*). The Plaintiff is therefore

challenging the validity of the purported amendment to both clauses 25 and 27 of the SPAs from the inception or execution of the SPAs. The contractual breach that the Plaintiff is complaining about is the purported amendment to clauses 25 and 27 of the SPAs (see *Nasri v. Mesah*). Since the Plaintiff is challenging both clauses 25 and 27 of the SPAs from the inception or execution of the SPAs, then the Plaintiff's cause of action runs from the date of the execution of the SPAs, that is, on 11.7.2012 and 18.7.2012, respectively.

[34] Therefore, we agree with the learned Judge that the Plaintiff's claim is barred by limitation, as the six (6) year period had expired on 10.7.2018 and 17.6.2018, respectively. Since this suit was filed on 18.6.2020, the limitation has already set in.

(ii) If they were not happy with the completion period of 54 months, they should not have proceeded with the purchase, but they did and now enjoys the benefits of the development. They cannot be allowed to approbate and reprobate their stand/election as and when they like solely for their benefit to profit out of it unjustly. Their action in filing this suit post the decision of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* (*supra*) is a clear indication that their sole opportunistic objective is to enrich themselves in a substantial and inflated LAD unjustly. See *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453, FC of what would amount to unjust enrichment. In any event, the several declarations sought by the plaintiffs in encl. 6 cannot be determined in a summary judgment application. The Court of Appeal ruled in *Choong Mee Leng v. Lam Chong Seng* [2005] 3 CLJ 350; [2005] 5 MLJ 97, CA that declarations are not one of the reliefs available. See also *Cotra Enterprises Sdn Bhd v. Pakatan Mawar (M) Sdn Bhd* [2001] 7 CLJ 261, HC.

(iii) It is trite for contracting parties that no evidence can be given in proof of the contract's terms, varying adding to or subtracting from the terms of the written agreement: s. 91 and s. 92 of the Evidence Act 1950. See *Tahan Steel Corp Sdn Bhd v. Bank Islam Malaysia Bhd* [2005] 1 SHLR 117, HC, that promises between parties must be referred to the contemporaneous documents. *Small Holders Corp Sdn Bhd & Anor v. Utusan Transport Sdn Bhd* [1995] 1 LNS 223, HC, ruled that in the absence of vitiating factors, parties are bound to their bargain; see also *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22; [2009] 6 MLJ 839, CA; *Tan Ah Tong v. Parveen Kaur* [2012] 10 CLJ 159; [2011] 5 MLJ 428, CA. The court will not assist in invalidating an agreement that parties with common intentions had agreed to execute. *L'estrage v. F Graucob* [1934] 2 KB 394, CA Eng, affirmed that the clauses of a written contract are binding on the signatories, even when a party is purportedly unaware of it. The defendant argued in the present case that claiming LAD outside the

scope of the SPAs would require the intervention of extrinsic evidence justifying why it should be so, which in this case, the plaintiffs have none. To do so would open the floodgates to disruptive consequences in the housing industry, especially so when the transactions had been formerly concluded several years ago (2017);

(iv) The pleadings of the plaintiffs in their SOC at paras. 9, 14, 15, 20(a), and 20(b) support their belief that the SPAs were invalid at the time of the execution of the respective SPAs by being in breach of cls. 25 and 27 therein in departing from Schedule H of the HDR 1989. Since the validity is contested, the time runs from the date (sometime in July 2012 to June 2013) of the respective SPAs. See *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Another Appeal*, CA (*supra*), that had affirmed the High Court findings that limitation runs in the present circumstances from the date of the execution of the SPAs;

(v) If the plaintiffs are genuinely aggrieved with the Executive decision allowing the EOT in cls. 25 and 27 of the SPAs, they must challenge that decision of the public body concerning public law issues by way of judicial review (O. 53 ROC 2012), to quash it and render the amendment to cls. 25 and 27 invalids. To barely assert ignorance on the issue is not tenable in law: *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865, FC; *Superintendent Of Lands And Surveys, Samarahan Division & Anor v. Abas Naun & Ors And Another Appeal* [2015] 1 CLJ 18; [2015] 6 MLJ 788, FC; *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Mohd Sobri Che Hassan* [2020] 1 CLJ 595; [2019] MLJU 1312, FC. The case of *Ang Ming Lee*, FC, which is the foundation of this action by the plaintiffs, was a case where the decision by the executive to grant the amendment/extension was challenged by a judicial review, which declared the action invalid. Since the crux of the plaintiffs' argument in the present case hinges on the said EOT, then it has to be quashed by judicial review to enable the amendment to the clauses to be struck down, and not by this civil action seeking a declaration, or else it would cause the mechanism of judicial review to be rendered useless or redundant. This EOT issue is undoubtedly a public law issue and cannot be claimed otherwise. Unless extended by the High Court, the three-month limitation would have barred the plaintiffs from challenging the EOT under judicial review provided for in O. 53 ROC 2012. See *Majlis Perubatan Malaysia & Anor v. Asia Pacific Higher Learning Sdn Bhd* [2019] 5 CLJ 513; [2019] 1 MLJ 471, CA. This civil suit by the plaintiffs in the present action is the wrong mode of process and must be struck off. See also the Court of Appeal in *Bludream City Development Sdn Bhd v. Kong Thye & Ors And Other Appeals* (*supra*), that said that the purchasers were entitled to apply for leave to commence

judicial review as soon as becoming aware of the EOT, but did not do so. In the present case, the status of the EOT in cls. 25 and 27 was made known to the plaintiffs before the execution of the respective SPAs between 2012 to 2013. Still, they elected to proceed and never, throughout the construction and completion period, made any challenges to the said EOT in the SPAs and sought an abridgment of time from the High Court to do so. Therefore, it is argued that to circumvent the time requirement, the plaintiffs elected to pursue this civil suit seeking orders of a similar impact on the said EOT to sustain their suit. This amounts to an abuse of process, which must not be allowed. This argument was canvassed and ventilated in the *Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases* [2021] 10 CLJ 596, HC, which found in favour of the defendant:

> [35] I find favour in the Defendant's counsel argument that the predominant and sole subject matter of the Plaintiff's suit lies on the validity of the EOT. The same is within the sphere of the public law, which was challenged by the Plaintiffs, and the EOT being a decision granted by the Ministry of Housing and Local Government, can only be challenged by way of a judicial review and not a writ action.
>
> [36] It is my considered view that the Plaintiffs' conduct in filing this suit to seeking *inter alia* a declaration that the EOT granted by the Defendants herein null and void pursuant to the Federal Court decision in *Ang Ming Lee* (*supra*) is improper and an abuse of process. Firstly, an application to challenge a decision of a public authority, *ie*, the Minister and/or the Housing Controller, must be made by way of judicial review. Secondly, the Plaintiffs' suit was only limited to the developer and did not include the Minister and/or the Housing Controller, whose decision in allowing the EOT is being challenged. With reference to this issue, I am of the opinion that the non-inclusion of the Minister and/or Housing Controller as parties are fatal as both the Minister and/or the Housing Controller must be given the right to be heard (better known as the "*audi alteram partem*" principle as explained by the Federal Court in *Dr. Lourdes Dava Raj a/l Curuz Duraj Raj v. Dr. Milton Lum Siew Wah & Anor* [2020] 5 MLJ 185). Thus, the Plaintiff's application for a declaratory order that the EOT given was null and void is flawed and irreparable. As held by the Federal Court in *Ang Ming Lee*, the absence of any affidavit from the Minister had fortified its finding that there was no decision from the Minister. This further reinforces my view that the Minister should rightly be named as a party by the Plaintiffs in challenging the EOT.
>
> [37] In a situation where a litigant uses the court's machinery improperly, the court is vested with ample powers to strike out an irregular proceeding …

(vi) In default of invalidating the said EOT by the foregoing mode, their failure to join the Ministry of Housing and Local Government and the Controller as a party renders this civil suit premature and abuse of process. This defect is fatal to their action: *Obata Ambak Holdings Sdn Bhd* (*supra*). It is trite that a non-joinder of a party gives rise to a violation of fundamental natural justice if the decision/declaration sought is intended to bind such a party. See *Muhammad Zamri Vinoth Kalimuthu v. Arumugam Dorasamy* [2021] 1 LNS 1229; [2021] MLJU 1472, HC; *Sundram Ramasamy v. Arjunan Arumugam & Anor* [1994] 4 CLJ 300; [1994] 3 MLJ 361, SC;

(vii) In the circumstances, the plaintiffs are estopped from denying the completion period of 54 months. It is trite that a party cannot be allowed in equity to renege on a promise when through his action it had led the other to believe that he would not insist on his strict legal rights: *Thomas Huges Appellant; And The Directors, & C., Of The Metropolitan Railway Company Respondents* (1877) 2 App. Cas. 439, HL; *Birmingham Land Company v. London And North Western Railway Company* [1886 B.571], (1888) 40 Ch. D 268. A party who represented that he will not insist upon his strict rights under contract will not be allowed to resile from that position unless reasonable prior notice is given: *Sim Siok Eng v. Government Of Malaysia* [1977] 1 LNS 116; [1978] 1 MLJ 15, FC. The court needs to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case in achieving justice: *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331, FC; and applied in *Alpine Return Sdn Bhd v. Matthew Ng Hock Sing & Ors* [2022] 1 CLJ 120; [2021] MLJU 1923, HC in determining the issue of EOT (36 to 60 months) by holding that estoppel should apply in that case to prevent the purchasers from denying the terms in the SPA;

(viii) The plaintiffs who had received compensation for late delivery to which they have signed settlement letters are estopped from claiming LAD against the defendant. They have waived their right under the Contracts Act 1950. A promisee may dispense with, or remit performance of a promise: Section 64 Contracts Acts 1950; applied by the Supreme Court in *Associated Pan Malaysia Cement Sdn Bhd v. Sykt Teknikal & Kejuruteraan Sdn Bhd* [1990] 2 CLJ 913; [1990] 1 CLJ (Rep) 15; [1990] 3 MLJ 287, SC. The settlement agreement/letters executed by the entitled plaintiffs were given recognition in *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252; [2014] MLJU 1392, CA; *Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases* (*supra*). The plaintiffs failed to explain why they have

a right to claim LAD outside the scope since the 36 months are not a term in the respective SPAs: *Amazing Place Sdn Bhd v. Couture Homes Sdn Bhd & Anor* [2010] 1 LNS 823; [2011] 7 MLJ 52;

(ix) In filing a class-action suit, it is trite that the rule of privity of contract must be observed. In the present suit, since the plaintiffs have entered into separate SPAs respectively, the law on privity dictates that none of them can represent each other in their contracts even if the contract is identical: *Markt & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 2012. The King's Bench upheld the rule on privity of a contract even if the contract may be identical. The Court of Appeal in *Tan Poh Yee v. Tan Boon Thien & Other Appeals* [2017] 3 CLJ 569; [2017] 3 MLJ 244, CA, ruled similarly. Consequently, none of the plaintiffs had the requisite *locus* or nomination to represent the other on their separate and individual SPAs. All the plaintiffs herein should have filed a separate action individually in the circumstances. There is no indication in the intitule or body of the suit that it is intended as a representative action which consequently would be fatal: O. 15 r. 12 ROC 2012; *Re Tong Tai Holdings Sdn Bhd* [2003] 6 CLJ 170; [2003] 5 MLJ 450, HC;

(x) The plaintiffs had failed to particularise any actual losses or damages contrary to O. 18 r. 12 ROC 2012. The Federal Court held that a plaintiff must prove actual damages or reasonable compensation when making a claim for LAD: *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817, FC. The plaintiffs in the present case merely prayed for LAD from the date of the sales confirmation form (booking date) onwards (notwithstanding the date of the SPA) and claimed that they suffered losses without in any way particularising and proving them; and

(xi) Non-retrospective effect of *Ang Ming Lee*, FC in the present case. The doctrine of prospective overruling predicated on conditions of legal certainty which required the court, as an exceptional measure, to declare the law for the future only is applicable in Malaysia: *Abillah Labo Khan v. PP* [2002] 3 CLJ 521; [2002] 3 MLJ 298, CA. The House of Lords in *Re Spectrum Plus Ltd; National Westminster Bank plc v. Spectrum Plus Ltd and Others* [2005] UKHL 41, HL observed that prospective overruling, sometimes described as 'non-retroactive overruling,' is a judicial tool fashioned to mitigate these adverse consequences. It describes court rulings on points of law that, to a greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions. Prospective overruling would be necessary to serve the underlying objective of the courts of this country to administer justice fairly and in accordance with the law. The Federal Court in *Letchumanan Chettiar Alagappan (As Executor To Sl Alameloo Achi (Deceased) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418, FC observed:

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[83] In other words, prospective rulings are consistent with judicial functions. Other notable observations of His Lordship were that 'in other common law countries prospective overruling has taken root as such only in the United States of America and India (in constitutional matters, and in Ireland (see *Murphy v. Attorney-General* [1982] IR 241 and The Law Quarterly Review Vol 120 at p. 8)' and that 'the essence of the principled argument against prospective overruling is that in this country prospective overruling is outside the constitutional limits of the judicial function … would amount to the judicial usurpation of the legislative function … only prospective effect, it is said, is not inherent in the judicial role'.

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The Federal Court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1, FC, in overruling its earlier decision, held that an allegation of fraud, even if such an allegation concerns 'criminal fraud', need only be proven on a balance of probabilities in civil cases and not beyond all reasonable doubt. The Federal Court has applied the doctrine of prospective overruling in *Sinnaiyah & Sons Sdn Bhd* at para. [54], as follows:

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> [54] However, we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims.

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The Supreme Court in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311, SC similarly gave prospective effect to its decision regarding the unconstitutionality of the then s. 418A of the Criminal Procedure Code. Abdoolcader SCJ said:

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> I would accordingly declare that section 418A is in violation of the provisions of article 121(1) and therefore unconstitutional and void under the provisions of article 4(1). The Deputy submits that any such pronouncement will create chaos as the section in question has been resorted to and trials held in the High Court as a result. The section has indeed been implemented, and convictions and acquittals secured as a result over a span of some eleven years in view of the decision in the Hongkong Bank case, and it will therefore be necessary in these circumstances to apply the doctrine of prospective overruling in this case.

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The High Court in *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd Intervener)* [1995] 2 CLJ 846; [1995] 2 MLJ 421, HC held that:

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> In the instant case, I make an order and declare that my judgment herein is effective in relation to the auctioneer in this matter and to all other auctioneers who make their respective claims for their fees in respect of all auction sales conducted or

after the date of the judgment herein, while fees claimed by auctioneers in respect of all auction sales before the date of this judgment will remain undisturbed and not be affected.

Notwithstanding the High Court decision in *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Application* (*supra*) that had ruled that *Ang Ming Lee*, FC, *supra*, had retrospective effect, it is impressed upon this court not to take the same path, as from the facts of the present case have sufficiently indicated the dire consequences and abuse of process that it would bring forth in the housing industry. As observed in the Federal Court cases and the Supreme Court case, the doctrine of prospective overruling should prevail in the circumstances to mitigate the adverse and abusive consequences, as can already be seen in numerous cases.

[11] The differences between *Ang Ming Lee*, FC, (*supra*), and the present case are clearly distinguishable:

(i) *Ang Ming Lee*, FC was grounded on an action premised on a judicial review to challenge the EOT by the Ministry, which was granted after the parties had executed the SPA. The EOT applied under reg. 11 HDR 1989 was rejected initially but allowed after an appeal to the Minister, while in the present case, the plaintiffs' action to challenge the SPA is by a writ action in an attempt to invalidate the amendment to cls. 25 and 27 allowed by the EOT from the Ministry that was secured before the finalisation and execution of the SPA, allowed under reg. 11 of the HDR 1989.

(ii) Unlike *Ang Ming Lee*, FC, where the term of 36 months was not an issue in the SPA nor was it amended, the extension for completion granted by the Ministry was. While in the present case, the plaintiffs needed to show why a perfectly entered and completed SPA with the approval of the Ministry (EOT) in amending cls. 25 and 27 showing a term of 54 months in the SPA is invalid.

(iii) In *Ang Ming Lee*, FC, the Minister and Controller of Housing and Local Government were parties in the judicial review. These parties will be affected or impacted by any court decision. In contrast, in the present case, the plaintiffs elected not to join those public authorities when contesting the validity of the amendment to cls. 25 and 27 in the respective SPAs before its execution thereof by the parties, which was brought about by the granting of the said EOT by the Ministry.

(iv) The learned judge of the High Court in *Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases* (*supra*) observed that:

A [20] I begin my analysis with a comparison of the facts herein and the facts in the case of *Ang Ming Lee* (*supra*). It should be noted that the facts in *Ang Ming Lee* (*supra*) involved two EOTs which were granted by the Controller to the developer. The first EOT was granted before the SPAs with the purchasers were signed, whilst the 2nd EOT was granted upon the conclusion of the
B SPAs with the purchasers. My findings on this comparison exercise are set out as follows:

(a) Firstly; the Plaintiffs in the case of *Ang Ming Lee* (*supra*) brought the suit *via* a judicial review, whereas the Plaintiffs in the present case initiated the action *via* a writ;

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(b) Secondly, in the case of *Ang Ming Lee* (*supra*), the aggrieved purchasers who were unable to claim LAD commenced action by way of judicial review against the Minister, the Controller of Housing, and the developer seeking (i) an order of *certiorari*, quashing the decision of the Controller;
D and (ii) a declaration either jointly or in the alternative, that (a) the letter allowing the EOT given by the Controller was invalid and beyond the jurisdiction stipulated in the Housing Development (Control & Licensing) Act 1966 ("the Act"); and (b) Reg. 11(3) of the Regulations was *ultra vires* the Act (this is similar to the
E case of *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Other Application* [2020] 10 MLJ 689. In the present cases before me, neither the Minister nor the Controller has been brought in as a party. Neither does the Plaintiffs seek to quash the EOT granted by the Controller to Defendant.

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(c) Thirdly, in *Ang Ming Lee* (*supra*), the Federal Court was not required to deal with the issue of an SPA being time-barred pursuant to s. 6(1) of the Limitation Act 1953.

[21] It is also my observation that the rest of the cases referred to by the Plaintiffs do not involve a judicial review application
G process against the Minister and/or the Controller and the developer for allowing the developer's application for EOT. These cases also do not deal with a suit commenced pursuant to a cause of action based on a SPA which is purportedly statute-barred, unlike in the present case ...

H …

[58] Given the background of the present suits, which was after the decision of the Federal Court in *Ang Ming Lee* (*supra*) without going through the process of judicial review, I have no doubt that the Defendant herein is totally caught off guard. I am also
I of the view that the Defendant is clearly at a disadvantage of having to defend the decision of the Minister and/or Controller, which was given in 2010, against the decision in *Ang*

Ming Lee (*supra*), which was decided circa ten (10) years later in 2020. Bearing in mind that the law back in 2013 was as held in *Sentul Raya Sdn Bhd* (*supra*), which allowed the developer to apply for a deviation of the terms of the prescribed SPA in Schedule H of the HDR, I share the same view as Asmabi J that to allow the decision in *Ang Ming Lee* (*supra*) to apply to the facts of this case would be absurd and against public policy. It is my respectful view that to do so will not only open unnecessary floodgates against all developers in this country, leading to a crippling effect on the housing industry, it will also lead to judicial chaos with thousands of cases being filed in court claiming additional LAD pursuant to and based on *Ang Ming Lee* (*supra*).

(v) In further support of their arguments, the plaintiff cited the grounds of the High Court decision concerning similar facts in *Vignesh Naidu Kuppusamy Naidu v. Prema Bonanza Sdn Bhd* [2021] 1 LNS 2551 HC:

[26] At this juncture, I am of the view that the Plaintiff could not rely on the *Ang Ming Lee* case since there are substantive differences of background facts for both cases. Further, no amendments were made to the completion period after the parties had signed the SPA, unlike in *Ang Ming Lee.* Contrary to *Ang Ming Lee*, where the EOT was given after the signing of the SPA between the parties, and there were amendments made to the terms in the prescribed form in Schedule H of HDR 1989, which changed the completion period for delivering vacant possession from thirty-six (36) months to forty-eight (48) months.

[27] In addition, the Plaintiff has failed to provide particulars as to why he has the right to claim LAD outside the scope of the SPA as the thirty-six (36) months are nowhere to be found within the SPA signed by both parties. Therefore, the Plaintiff's claim for LAD based on a calculation of thirty-six (36) months has no legal basis or without merits.

[28] It is trite law that the parties to a contract are bound by the terms of the contract between them to perform their respective promises. It is also clearly provided under Section 38 of the Contracts Act 1950 that a party to a contract must, unless excused under the Contracts Act or any other law, be bound by the terms of the contract so entered between them. There is no dispute between parties that the SPA has been concluded. The terms of the SPA are clear and unambiguous, and the Plaintiff is bound by them. Plaintiff is therefore estopped from denying what had been agreed between them (See Court of Appeal in *Anuar bin Abu Bakar v. Samsuri bin Booyman* [2016] 8 CLJ 317; [2016] 6 MLJ 96).

A [29] Moreover, the Defendant has fully paid the Plaintiff the LAD in the sum of RM13,067.40 for the late delivery of vacant possession in accordance with the terms of the SPA. The Plaintiff has signed a letter dated 07.03.2017 and further undertaken to waive any further claims, demands, and/or not to institute any legal suit or proceeding against the Defendant.

B Summary Judgment – Enclosure 5

[30] I am very well aware, and it is trite, that Summary Judgment is not intended to shut out a defendant with a *bona fide* defence. The Summary Judgment can only be allowed in a plain case with no triable issues to warrant a full trial. Therefore, what C needs to be proven by the Plaintiff is to show that there is no triable issue or issues that ought to be heard in full. Before me, the Defendant has successfully proven that the Plaintiff's case discloses no reasonable cause of action in the Defendant's Striking Out application.

D [31] In conclusion, I find that the Plaintiff's claim is obviously unsustainable and ought to be struck out pursuant to Order 18 Rule 19(1) of ROC 2012. Thus, the Defendant's striking out an application in Enclosure 20 is allowed with costs of RM3,000.00. As to Enclosure 5, with the foregoing principles in mind, the application for Summary Judgment by the Plaintiff is dismissed E with costs of RM3,000.

In the premise, the defendant prays that the plaintiffs' encl. 6 for summary judgment is dismissed with costs.

Part B

F **Enclosure 7: Striking Out By The Defendant**

Submissions By The Defendant

[12] The defendant, seeks to strike out this suit premised on three grounds under O. 18 r. 19 ROC 2012:

G (i) That this suit against the defendant is frivolous and vexatious;

(ii) That this suit against the defendant may prejudice, embarrass or delay the fair trial of the action; and

(iii) That this suit against the defendant is an abuse of the court's process. H

It is grounded on the assertions *inter alia* that the plaintiffs' claim is statute barred:

(i) The plaintiffs did not explain the delay in the filing of the claim, and no extension of time is sought;

I (ii) The plaintiffs' claim is unfounded in that it is outside the scope of the SPA signed by the parties;

(iii) The challenge of the EOT is in the realm of public law;

(iv) The plaintiffs commenced the action in the wrong mode, which should have been by judicial review, and the plaintiffs had failed to satisfy the three months period to file a judicial review application;

(v) The plaintiffs failed to particularise their loss/damages.

(vi) The plaintiffs know of the 54 months and consented to the same;

(vii) The plaintiffs' filing of a class action herein is erroneous; and

(viii) The plaintiffs' action is to unjustly enrich themselves and lack *bona fide.*

Post *Ang Ming Lee*, FC, (*supra*), and armed with that judgment, the plaintiffs assert that they are entitled to claim LAD outside the scope of the SPA already perfected and completed sometime in the first quarter of 2017. The respective SPAs were finalised with the Ministry over the EOT (16 December 2010) several years before it was executed with the plaintiffs (2012-2013). The defendant argued that:

Striking out pleadings and endorsements (O. 18 r. 19 ROC 2012)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) **it is scandalous, frivolous, or vexatious;**

(c) **it may prejudice, embarrass or delay the fair trial of the action;** or

(d) it is otherwise **an abuse of the process** of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading. (emphasis added)

In support, they cited *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, SC:

The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule, and the summary procedure can only be adopted when it can clearly be seen that **a claim**

A **or answer is on the face of it 'obviously unsustainable.'** It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.
(emphasis added)

In *Trace Consultant Services Sdn Bhd v. Koperasi Mahadaya Bhd & Anor* [2013] B 1 LNS 112; [2013] 10 MLJ, it was held that the plaintiff's case was doomed from the beginning even if it was ordered to be fully tried. The action was obviously unsustainable, an abuse of the court process, and wholly frivolous. It also argued that scandalous means wholly unnecessary and irrelevant, not just unpleasant allegations, while frivolous or vexatious denote that the C pleadings are obviously unsustainable: *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11; *Tarlia Enterprises Sdn Bhd v. Ng Giak Pin* [2020] 1 LNS 2219; [2010] MLJU 2321. Where the court process has not been used in a *bona fide* manner, it has been abused. Category of abuse is never closed and will be D expanded over time: *Hadi Hassan v. Suria Records Sdn Bhd & Ors* [2004] 8 CLJ 225; [2005] 3 MLJ 522.

[13] The defendant argued that:

(i) When the action is statute-barred, it ought to be struck out under O. 18 r. 19(1)(b) ROC 2012: *Parkson Corporation Sdn Bhd v. Fazaruddin* E *Ibrahim* [2002] 4 CLJ 18; [2011] 2 MLJ 46. It is trite that parties are bound by the terms of their bargain, entered at arm's length: *Amazing Place Sdn Bhd v. Couture Homes Sdn Bhd & Anor* [2010] 1 LNS 823; [2011] 7 MLJ 52. The court is bound to construe the SPA in the present case within its four walls, and extrinsic evidence to contradict F agreed terms is not admissible: Sections 91 and 92 Evidence Act 1950. The plaintiffs' suit herein is obviously unsustainable and must be struck out. It is a frivolous and vexatious claim that is clearly out of time (after a lapse of six years from the breach at the signing of the SPAs, since its validity is contested for incompliance with Schedule G H, HDR 1989, in paras. 9, 14, 15 SOC): Section 6(1)(a) Limitation Act 1953. Grounded on a completion period of 54 months, the limitation sets in approximately three years ago (18 July 2018). The time runs from the date of the breach of the SPA: *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717; [2006] 2 MLJ 209, FC. The burden to show they are within time rests H on the plaintiffs, which they have failed to do in the present case: *Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors* [2010] 1 LNS 370; [2010] 9 MLJ 603. The defendant reiterated their argument in the findings of the Court of Appeal in a similar fact case in *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd* (*supra*) when it held I that the plaintiff was essentially disputing the validity of the SPA, and hence the cause of action runs from the date of execution of the SPAs. Consequently, the claim herein clearly falls outside the limitation period since the SPA was entered between July 2012 to June 2013:

[25] We would agree with the Plaintiff/Appellant if the Plaintiff's claim for LAD is simply based on clauses 25 and 27 of the SPAs, where the delivery period of the Properties was agreed/ contracted at fifty-four (54) months.

[26] However, the Plaintiff's claim herein is not based on clauses 25 and 27 of the SPAs, which the parties have signed …

[29] Therefore, in gist, on its pleaded case, the Plaintiff's cause of action is that:

(i) that the SPAs were invalid at the time of signing, as the SPAs had failed to comply with the prescribed Schedule H; and

(ii) that the Defendant has breached Schedule H of the HDR 1989 by amending the time delivery of vacant possession from thirty-six (36) months to fifty-four (54) months …

[33] In other words, the Plaintiff is challenging the validity of both clauses 25 and 27 of the SPAs from the date of the signing/ execution of the SPAs. This challenge is premised on a breach of Schedule H of the HDR 1989, as interpreted by the Federal Court in *Ang Ming Lee* (*supra*). The Plaintiff is therefore challenging the validity of the purported amendment to clauses 25 and 27 of the SPAs from the inception or execution of the SPAs. The contractual breach that the Plaintiff is complaining about is the purported amendment to clauses 25 and 27 of the SPAs (see *Nasri v. Mesah*). Since the Plaintiff is challenging both clauses 25 and 27 of the SPAs from the inception or execution of the SPAs, then the Plaintiff's cause of action runs from the date of the execution of the SPAs, that is, on 11.7.2012 and 18.7.2012, respectively.

[34] Therefore, we agree with the learned Judge that the Plaintiff's claim is barred by limitation, as the six (6) year period had expired on 10.7.2018 and 17.6.2018, respectively. Since this suit was filed on 18.6.2020, the limitation has already set in.;

(ii) The plaintiffs in the present action had entered into their respective SPAs out of their own free will under no duress, undue influence, coercion, or misled into it. They knew well enough what the terms in the agreement were and could have refused and walked away, but they assented to it and signed. The plaintiffs cannot deny actual knowledge of the 54-month completion period on signing their respective SPAs between 2012 and 2013. In the circumstances, the limitation would have set in as early as 9 July 2018 and 24 July 2018. In *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, SC, the Supreme Court ruled that a cause of action is a plaintiff's right, either by law or by statute, that had been adversely affected or prejudiced by the defendant. The Federal Court in *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ, FC

ruled that the right to bring an action may arise on various events, but limitation runs from the earliest time a legal action could have been taken. The Federal Court in *Nadefinco Ltd v. Kevin Corporation Sdn Bhd* [1978] 1 LNS 127; [1978] 2 MLJ 59, FC, ruled that time must run from the date of the default. In the present case, the plaintiffs have offered no explanation for the delay in this action or why time should be enlarged in the circumstances.

(iii) From their SOC, the plaintiffs are challenging the EOT (36 to 54 months) granted for the project before the SPAs were entered, several years later. If they were unhappy with the completion period of 54 months in the SPAs, they should not have proceeded with the purchase, but they did and now enjoys the benefits of the development. They cannot be allowed to approbate and reprobate their stand/election as and when they like, solely for their benefit to profit out of it unjustly: *Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v. Liew Choong Kin* [2018] 6 CLJ 217; [2018] 3 MLJ 354, CA. Their action in filing this suit post the decision of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* (*supra*) is a clear indication that their sole opportunistic objective is to enrich themselves in a substantial and inflated LAD unjustly. See *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453, FC of what would amount to unjust enrichment. In a similar fact case, the High Court in *Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases* (*supra*), Mohd Firuz Jaffril J agreed with this argument and ruled that:

> [45] This court is of the considered view that the period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed on the ground of equitable consideration.
>
> [46] The provision of Section 6(1)(a) of the Limitation Act 1953 is mandatory in nature. This court has no discretion or inherent powers to condone the delay if the action is filed beyond the prescribed statutory period of limitation or if the cause of action is barred by limitation unless the matter is covered by any of the exceptions, which is not the case here.
>
> [47] Therefore, this court has not only the power but also the duty to consider as to whether the action is time-barred, and if it is found to be time-barred, the court is duty-bound to strike out the action (See *Muhamad Solleh bin Saarani & Anor v. Norruhadi bin Omar & Ors* [2010] 9 MLJ 603).
>
> [48] The rationale of the law of limitation has been lucidly explained by the late Hashim Yeop Sani, Chief Justice of Malaya, in the case of *Credit Co (M) Bhd v. Fong Tak Sin* [1991] 1 MLJ 409 at pp. 413-414 in this way:

The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and, more importantly, to have a definite end to litigation. This is in accordance with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state, there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[49] Justice Abdul Malik Ishak, in the case of *Asia Pacific Land Bhd & Ors v. Datuk Bandar Kuala Lumpur* [2006] 2 MLJ 137, further referred to the Privy Council case of *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 MLJ 1, of which I agree:

It goes without saying that stipulations as to time must be strictly followed and cannot be treated lightly. Legal practitioners should always be wary of the time constraint and must always double-check whether limitation has set in. Thus, when a defence of limitation is clearly available to the defendant, like in the present case at hand, the defendant ought not to be deprived of it, and that right cannot be taken away by anyone willy-nilly. Lord Brightman, in the case of *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 MLJ 1, puts it rather well when his Lordship said at p. 5 of the report:

In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right that is not to be taken away by conferring on the statute a retrospective operation unless such a construction is unavoidable. Their Lordships see no compelling reason for concluding that the respondents acquired no 'right' when the period prescribed by the 1948 Ordinance expired, merely because the 1948 Ordinance and the 1974 Act are procedural in character. The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give and not to deprive; it was to give to a potential defendant, who was not on 13 June 1974 possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence that he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he had been retained, and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

...

A [51] The Defendant in this present case should be entitled to find comfort in the fact that it is no longer at risk from a stale claim, given that the SPAs were entered into more than 6 years ago. It should be able to part with its records and be unencumbered from any burden in obtaining proof of witnesses related to the granting of EOT back in the year 2010.

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[57] Based on basic common sense, it would be absurd and against public policy for the applicant to rely on cases decided in 2006 and 2013 to apply to the factual matrix of this case which was decided in 2004. If the respondent and/or this court were to allow this to happen, this would lead to a floodgate for all litigants to apply for an extension of time each time cases involving their rights were decided by the court differently from the earlier decisions of the court. There would be no finality in the decisions, and the whole judicial process will be a total mess. As such later decisions of the court will not have any retrospective effect, and these decisions will only be binding on future cases.

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(iv) In the circumstances in the present case, the defendant asserted that the cause of action had arisen as early as 11 July 2012, and consequently, the defendant ought to be protected from a stale claim;

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(v) The plaintiffs failed to explain why they have a right to claim LAD outside the scope since the 36 months are not a term in the respective SPAs: *Amazing Place Sdn Bhd v. Couture Homes Sdn Bhd & Anor* [2010] 1 LNS 823; [2011] 7 MLJ 52;

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(vi) It is trite that when aggrieved by a decision of a public body concerning an infringed right protected under public law, any challenge to that decision shall be by way of a judicial review and must be made under the procedural requirement prescribed in O. 53 r. 1 ROC 2012: *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* (*supra*), where the suit was struck out when a challenge on an executive decision was not by judicial review. This was followed by the Federal Court in *Superintendent Of Lands And Surveys, Samarahan Division & Anor v. Abas Naun & Ors And Another Appeal* [2015] 1 CLJ 18; [2015] 6 MLJ 788, FC; *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Mohd Sobri Che Hassan* [2020] 1 CLJ 595; [2019] MLJU 1312, FC. It was held to be the wrong mode of process, incompliance with the rules of court, and constitute an abuse of process. In the present case, it is evident that the challenge by the plaintiffs on the amendment to cls. 25 and 27 of the respective SPAs arising from the EOT granted by the Ministry involves issues of public law (para. 14 SOC); therefore, any challenges mounted by the plaintiffs must be by way of judicial review. From the

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facts, it is evident that they are out of time (neither did they apply for abridgment of time). To circumvent that predicament, they proceeded with this civil suit seeking declarations to invalidate the said amendment. In *Majlis Perubatan Malaysia & Anor v. Asia Pacific Higher Learning Sdn Bhd* [2019] 5 CLJ 513; [2019] 1 MLJ 471, CA. the Court of Appeal made it clear that a predominantly public action in nature, the action lies in O. 53 ROC 2012. *Pen Apparel Sdn Bhd v. Leow Chooi Khon & Ors* [1995] 4 CLJ 606; [1995] 4 MLJ 764 ruled that the court is empowered to strike out the suit based on the wrong mode or process;

(vii) The plaintiffs had also failed to particularise any actual losses or damages contrary to O. 18 r. 12 ROC 2012. The Federal Court held that a plaintiff must prove actual damages or reasonable compensation when making a claim for LAD: *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817, FC. The plaintiffs in the present case merely prayed for LAD from the date of the sales confirmation form (booking date) onwards (notwithstanding the date of the SPA) and claimed that they suffered losses without in anyway particularising and proving them; and

(viii) In filing a class-action suit, it is trite that the rule of privity of contract must be observed. In the present suit, since the plaintiffs have entered into separate SPAs respectively, the law on privity dictates that none of them can represent each other in their contracts even if the contract is identical: *Markt & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 2012. The King's Bench upheld the rule on privity of a contract even if the contract may be identical. The Court of Appeal in *Tan Poh Yee v. Tan Boon Thien & Other Appeals* [2017] 3 CLJ 569; [2017] 3 MLJ 244, CA, ruled similarly. Consequently, none of the plaintiffs had the requisite *locus* or nomination to represent the other on their separate and individual SPAs. All the plaintiffs herein should have filed a separate action individually in the circumstances. There is no indication in the intitule or body of the suit that it is intended as a representative action which consequently would be fatal: O. 15 r. 12 ROC 2012; *Re Tong Tai Holdings Sdn Bhd* [2003] 6 CLJ 170; [2003] 5 MLJ 450, HC: The plaintiff in a representative action is required to state clearly in the summons and statement of claim that the action was taken up on behalf of themselves and on behalf of others (*Duke Of Bedford v. Ellis* [1901] AC 1), in default thereof, the plaintiffs had no proper authority to act for and on behalf of all other registered co-proprietors.

[14] In the circumstances, since the suit by the plaintiffs is time-barred, frivolous, vexatious, prejudicial, unjust, and an abuse of court process, the Bandar Builder test having been satisfied, the defendants pray that encl. 7 for striking out is allowed with costs.

A **Submissions By The Plaintiffs**

[15] The plaintiffs reiterate their assertion that the completion period in cls. 25 and 27 on the parcel units and common facilities was amended from 36 to 54 months in the respective SPAs, contrary to the form in Schedule H of HDR 1989. It is therefore invalid. Consequently, the plaintiffs argued B that the defendant had denied the first to 16th plaintiffs' claim for LAD for late delivery of the vacant possession and the common facilities to be calculated for the period of 36 months from the date of payment of the booking fee and/or in the alternative, 36 months from the date of the respective SPAs: *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah* C *& Anor* (*supra*). The basis of the plaintiffs' computation is that the completion period is to be calculated for the period of 36 months and not 54 months as stated in the SPA commencing from the date of payment of the booking fee where applicable. If the delivery of vacant possession is not delivered within the said period, LAD is payable. The plaintiffs argued that their claim is not D obviously unsustainable and should not be summarily dismissed. It discloses a reasonable cause of action or issues fit to be canvassed and ventilated at trial.

[16] The plaintiffs submitted as follows:

E (i) Based on *Ang Ming Lee*, FC, (*supra*), they claimed their clause of action arises from their contractual rights to claim LAD for late delivery of the parcel units and common facilities under their respective SPAs;

(ii) The Controller of the Ministry does not have the power to grant the EOT to the defendant to amend the SPA that they had executed in F respect of cls. 25 and 27 departing from the form in Schedule H of HDR 1989. On its face, the decision of *Ang Ming Lee*, FC, has a retrospective effect, and therefore it applies to the plaintiffs' claim. Reference was made to *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And* G *Other Application* [2020] 6 CLJ 55; [2020] 10 MLJ 689, HC, that held as a general rule *Ang Ming Lee*, FC had a retrospective effect unless expressly stated otherwise;

(iii) The plaintiffs asserted that the non-compliance or invalidity of cls. 25 and 27 in the respective SPAs does not render the SPAs null and void H and of no effect as contended by the defendant. The illegality of the said clauses in the SPAs was overridden by cl. 25(1) and cl. 29(1) of Schedule H, HDR 1989, giving rise to a cause of action according to cls. 25(2) and 27(2) of the respective SPAs. Therefore, it is within their legal right to claim for the LAD;

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(iv) The plaintiffs also submit that the said contractual entitlement for their claim for LAD accrued from the date of delivery of vacant possession of parcel units and common facilities that were stated in cl. 25(3) and cl. 27(3) of the SPA (same for both parcels and common facilities):

> (3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

This ultimately negates the limitation issue under s. 6 of the Limitation Act 1953 raised by the defendant. The time of accruement of the cause of action for claim of LAD by a purchaser of the parcels is stipulated in cl. 25(3) and cl. 27(3) Schedule H of the HDR 1989, as well as the respective SPAs of the plaintiffs and this, leaves no room for uncertainty that this court ought to give attention to. They argued, therefore, they are within time;

(v) The plaintiffs' claim herein is grounded on Schedule H of the HDR 1989, where no departure from its standardised format is allowed unless permitted by the statute: *Lee Poh Choo v. S.E.A Housing Corporation Sdn Bhd* [1981] 1 LNS 25; [1982] 1 MLJ 323; *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141, FC;

(vi) *Ang Ming Lee*, FC, (*supra*) had made it clear that:

> (1) The administrative power conferred under Section 24 of the Housing Development (Control and Licensing) Act 1966 (HDA1966) rests with the Minister of Urban Wellbeing, Housing and Local Government ("Minister") to determine the applicable terms and conditions of the SPA and was, therefore, non-delegable to the Controller;
>
> (2) Construing the said section 24 strictly renders Regulation 11(3) *ultra vires* the HDA 1966, and therefore, the Controller of the National Housing Department (Jabatan Perurnahan Negara) ("Controller") has no lawful authority to waive or modify any provision in the statutorily prescribed SPAs under Schedule H of the Housing Development (Control and Licensing) Regulations 1989 (HDR 1989); and
>
> (3) That power only resides with the Minister, and only the Minister can exercise the discretion to grant an EOT and not the Controller: *Bluedream City Development Sdn Bhd v. Kong Thye & Ors And Other Appeals* (*supra*).

(vii) The Minister has no power to delegate his discretion unless allowed by statute. The administrative maxim *delegatus non-potest delegare* applies that one cannot delegate a power delegated unless it falls within the exception. Therefore, the EOT granted to the defendant

signed off by the Controller and not the Minister is unsustainable for the defendant, as in such a circumstance, the said controller was exercising power that he does not legitimately have. To further compound the matter, even the letter of approval granted to the defendant was not signed off by the Controller, but by one of his officers, with no indication that it was done so for and on behalf of the Minister or the Controller;

(viii) The plaintiffs contended that the one-page letter did not contain the crucial basic details of the defendant's application, such as the date of the application nor the grounds thereof apart from the grant. Therefore, the significant lack of details in the letter alone cannot stand as conclusive evidence to give legal effect to the said EOT and to substantiate the variation of 36 months, especially in the absence of the defendant's application to the Ministry. Moreover, the plaintiffs argued that the defendant had only produced the Controller's letter dated 16 December 2013 but failed, refused, and/or neglected to show the actual application submitted to the Ministry of Housing and Local Government. The defendant's failure to produce a copy of its application for the EOT for 54 months is the smoking gun that necessitates the dismissal of the defendant's striking out application herein. In this respect, the court takes cognisance that in challenging and attacking the letter and the said Ministry, the affected party are not before the court to respond as they are not a party to this suit;

(ix) In the circumstances, the decision to grant the EOT was not legally valid and binding for the defendant to vary the period of delivery of vacant possession as stated in the SPAs. Consequently, the completion period of 36 months still applies in this case for the computation of the LAD under the respective SPAs. It matters not whether the EOT was procured before or after the execution of the respective SPAs: *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Application* [2020] 6 CLJ 55; [2020] 10 MLJ 689, HC;

(x) The High Court in *Leong Keng Chiang v. Prema Bonanza Sdn Bhd* [2021] 1 LNS 659 and *Lam Su See v. Prema Bonanza Sdn Bhd* [2021] 1 LNS 625; [2021] MLJU 713 before the same learned JC, citing *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618; [2008] 4 MLJ 852, CA; *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141, FC; and *Ang Ming Lee*, FC, observed that the SPAs entered by the parties must be as statutorily prescribed, and the developer is bound to follow the terms in Schedule H of the HDR 1989. The defendant is not allowed to deviate from the terms in Schedule H. The varied terms from 36 months to 54 months of delivery of vacant possession is, thus, a clear breach of Schedule H of the HDR 1989 and should be rightfully held so;

(xi) The plaintiffs further argued that it is inconsequential whether the defendant obtained EOT before or after the signing of SPA because the EOT obtained by the defendant is unlawful and void *ab initio*: *Leong Keng Chiang v. Prema Bonanza Sdn Bhd* (*supra*);

(xii) The use of the settlement letters/agreement to deny this claim by the defendant is untenable. They are premised on the computation of LAD based on 54 months, whereas the claim herein is based on a calculation of 36 months. There is no issue of the duplicity of the claim as argued by the defendant. The defendant cannot rely on the waiver in those letters or estoppel to halt this action. This is a right under a statute, and there can be no estoppel against a statute: *Lam Su See v. Prema Bonanza Sdn Bhd* (*supra*), HC; *Hedgeford Sdn Bhd v. Sri Gananatha Sivanathan & Ors* [2018] 1 LNS 1497; [2018] MLJU 1424, HC. The Court of Appeal in *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252; [2014] MLJU 1392, CA reaffirmed the position that the LAD provision in a SPA: Schedule H cannot be contracted out;

(xiii) The defendant had breached reg. 11(2) HDR 1989 by collecting booking fees from the plaintiffs to reserve the said pre-selected parcel units, though it was not credited directly into its account. The Court of Appeal in *Sri Damansara Sdn Bhd v. Voon Kuan Chien & Anor* [2020] 5 CLJ 619; [2020] 4 MLJ 265, CA, had ruled that the said regulation prohibits the collection of any prior payment before the execution of the SPA, or else there would be no protection afforded to the said purchaser in the event the SPA is not signed. The Federal Court also held that the law prohibits the developer from taking booking fees: *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* (*supra*). That said, it does not invalidate the respective SPAs of the plaintiffs. By taking the booking fees, the contract had effectively come into existence on that date regardless of the date of the execution of the SPAs: *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125; [1988] 2 MLJ 170, SC; applied in *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797; [1995] 2 MLJ 597, SC; *Sri Damansara Sdn Bhd v. Voon Kuan Chien & Anor* [2020] 5 CLJ 619; [2020] 4 MLJ 265, CA;

(xiv) Regardless of the assertions of the defendant, the plaintiffs maintained that their action is not that of a class action as all the claimants have been named and particularised as plaintiffs in this action;

(xv) *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* (*supra*), the Federal Court had decided that there is no unjust enrichment by the plaintiffs' as calculation of LAD begins from the date of payment of booking fee as what is prescribed by the statute.

The concept behind LAD is to compensate a purchaser for the developer's failure to comply with the statutorily prescribed timeline. The LAD prescribed by law is a statutory remedy afforded to the purchasers. There can therefore be no question of unjust enrichment upon an innocent party's rights to enforce his statutory remedy against the party in breach;

(xvi) The defendant argued that the plaintiffs' claim herein is an abuse of process and should be filed by way of judicial review proceedings. However, the plaintiffs contend that this claim has been filed under the correct mode as the matter is one of fact and law. It is a matter of private law concerning a public authority: *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* (*supra*). The plaintiffs, therefore, submit that the facts of this case are not amenable under the judicial review process. They are seeking relief under their respective SPAs. The impugned letter from the Controller was issued on 16 December 2013, *ie*, several years before the plaintiffs entered into the respective SPAs. Consequently, they could not avail themselves of O. 53 ROC 2012, as the time to apply for judicial review had lapsed. The defendant is not prejudiced or prevented from a fair trial without the inclusion of the Ministry because the defendant is at liberty to apply to cite the Ministry of Housing and Local Government as a co-defendant or as a third party. Also, the defendant can call witnesses from the Ministry of Housing and Local Government to give evidence on the EOT.

(xvii) The challenge is on the validity of cls. 25 and 27 in the SPAs rather than the decision made by the Controller approving the EOT. Therefore, it is not required to name the Ministry as a party to this claim.

[17] In the circumstances, the plaintiffs' claim herein is unsuitable for summary dismissal. There are serious issues to be tried of both facts and law, the plaintiffs, therefore, pray that encl. 7 for striking out is dismissed with costs.

The Law

Part A: Summary Judgment (Encl. 6)

[18] Summary judgment procedure is a procedural device available for the prompt and expeditious disposition of an action by a plaintiff or a counterclaim by a defendant without a trial when there is no dispute as to facts and the law: *UNP Plywood Sdn Bhd v. HSBC Bank Malaysia Bhd* [2010] 5 CLJ 177, CA. The law on summary judgment pursuant to O. 14 r. 1 ROC 2012, provides that where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an

appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the court for judgment against that defendant.

[19] Three preconditions must be satisfied for an O. 14 application:

(i) the defendant must enter an appearance to the action;

(ii) the statement of claim must be served on the defendant; and

(iii) the affidavit supporting the application must comply with the requirements of r. 2 of O. 14 ROC 2012.

The court will dismiss the application if any of these preconditions are not fulfilled. The Federal Court in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300, held:

> We think it appropriate to remind ourselves once again that in every application under Order 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14.

Once these three preconditions are met, the burden shifts to the defendant to raise triable issues: *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544, FC. Once the burden has shifted, the defendant must be able to show by affidavit whether he has raised a triable issue: *South East Asia Insurance Bhd v. Kerajaan Malaysia* [1998] 1 CLJ 1045; [1998] 1 AMR 657. In the case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400, the Supreme Court held that a complete defence need not be shown but the defence need only show that there is a triable issue.

> [1] In an application under O 14, the court has to be satisfied on affidavit evidence that the defence has not only first Affidavit an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need only show that there is a triable issue.

The defendant merely needs to show a triable issue and not a complete defence.

Part B: Striking Out (Encl. 7)

[20] The law on striking out of pleadings pursuant to O. 18 r. 19 ROC 2012 is well settled, the court is duly empowered in a summary manner to stay or dismiss an action or enter judgment accordingly where the pleading:

(i) Discloses no reasonable cause of action or defence ((1)(a));

(ii) Is scandalous, frivolous or vexatious ((1)(b));

(iii) It may prejudice, embarrass or delay the fair trial of this action ((1)(c));

(iv) Is an abuse of the process of the court ((1)(d)).

[21] The plethora of cases serves to remind the court that the power to strike out summarily without a trial is a drastic power that should be exercised with utmost caution and should only be exercised in plain and obvious cases. In *Bandar Builders Sdn Bhd v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, the Supreme Court held that the principle upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19 is well settled. It is only in plain and obvious cases that recourse should be had to the summary process under the rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is, on the face of it, "obviously unsustainable". It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence. The Federal Court in *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1, held that

> the 'obviously unsustainable' test adopted by *Bandar Builder* would ensure a fair trial and access to the court to litigants. The respondents should be given their day in court to prove their case. The court should not strike out an action purely or simply because it was unsustainable. The degree of 'unsustainability' (must be higher, *ie*, it must be 'obviously unsustainable' before the action could be struck out summarily. The High Court and the Court of Appeal were right in holding that the respondents' action was not obviously unsustainable and dismissed the appellant's application for striking out.

[22] The Federal Court in *Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals* [2018] 9 CLJ 425; [2019] 1 MLJ 59, held that the principle for striking out of pleadings pursuant to O. 18 r. 19 ROC 2012 is well settled. It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable. In the present case, the burden is on the defendant to show that the plaintiffs' claim against them is obviously unsustainable.

Findings

[23] In perusing the respective cause papers and submissions of parties, it is obvious that arguments by the parties on these encls. (6 and 7) revolve around the similar issues, arguments and overlapping with each other. In the circumstances, to avoid repetition, I will address issues arising in both enclosures together, with a collective conclusion after that.

[24] From the facts before me, it is evident that:

(i) Looking into the plaintiffs' SOC at paras. 9, 14, 15, 20(a) and 20(b), it advocates their belief on the invalidity of the SPAs at the time of execution in departing from Schedule H, HDR 1989. Clauses 25 and 27 are argued to be in breach in respect of the completion period (36 amended to 54 months) for delivery of the parcel units and common facilities, several years (2010) before the execution (2012 to 2013) of the respective SPAs.

(ii) It is a fact that the variations of those impugned clauses are not done arbitrarily but are locked to the EOT granted formerly by the Ministry and the amendment was carried out. Should the developer/defendant be faulted for adhering to the Ministry's approval on the genuine belief that it was something that could be done and had been done during that period and in 2010. By *Ang Ming Lee*, FC being silent on the retrospective or prospective nature of its ruling, the High Court in *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Application* [2020] 6 CLJ 55 held that since the Federal Court in *Ang Ming Lee* had not expressly ruled that its decision could only have a prospective effect, therefore the written judgment of *Ang Ming Lee* would carry a retrospective effect citing House of Lords in *Birmingham Corporation v. West Midland Baptist (Trust) Association (Inc)* [1969] 3 All ER 172, HL:

> We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that the rule as to the date of the notice to treat is wrong, we must decide that it always has been wrong, and that would mean that in many completed transactions, owners have received too little compensation. But that often happens when an existing decision is reversed.

(iii) In determining prospective overruling, legal authorities over the years have shown:

(a) *Abillah Labo Khan v. PP* [2002] 3 CLJ 521, CA: It is a principle of adjudicative jurisprudence that all court judgments are retrospective in effect;

(b) *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, FC: A decision of a court is retrospective in effect unless a specific direction of prospectively is expressed;

(c) *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284, SC: Eusoffe Abdoolcader SCJ citing *Linkletter v. Walker* [1965] 381 US 618 (US Supreme Court), ruled that the doctrine of prospective overruling had been acclimatised in the Malaysian adjudicative jurisprudence, where this judgment would only have a prospective effect when ruling that s. 418A CPC was unconstitutional;

(d) *Yugarajan Letchimanasamy & Anor v. PP & Another Appeal* [2020] 7 CLJ 372, CA: Held that s. 37A of the DDA 1952 unconstitutional by violating arts. 5(1) and 8(1) of the Federal Constitution but did not state if that decision applied prospectively.

(e) *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526, FC: Expressly stated that its decision to declare the unconstitutionality of s. 40D of the Land Acquisition Act to have a prospective effect so as not to impact earlier decisions;

(f) *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145, FC: Ruled that this decision is to have a prospective effect so as not to give retrospective effect to decisions of the court which had taken place before this judgment;

(g) *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584, FC: It ruled that its decision only applied to this appeal and future cases and will not be used to set aside or review past decisions involving the burden of proof (balance of probability) on fraud in a civil case;

(h) *Letchumanan Chettiar Alagappan (As Executor To Sl Alameloo Achi (Deceased) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418, FC: prospective overruling is consistent with judicial functions, and cited *PP v. Hue An Li* [2014] 4 SLR 661 that had provided the framework (individual factor-based test) to guide judges in the exercise of discretion in exceptional circumstances to restrict the retrospective effect of their judgments:

(1) The extent to which the law or legal principle concerned is entrenched;

(2) The extent of the changes in the law;

(3) The extent to which the changes in the law are foreseeable;

(4) The extent of reliance on the law or legal principle concerned.

(i) *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd Intervener)* [1995] 2 CLJ 846; [1995] 2 MLJ, HC: Applied prospectively in its decision that pertained to a court circular on auction sale; and

(j) *Re Spectrum Plus Ltd; National Westminster Bank Plc v. Spectrum Plus Ltd and Ors* [2005] 4 All ER 209, HL: Lord Nicholls for the House of Lords, in his speech, said that people generally conduct their affairs based on what they understand the law to be.

(iv) In the present case, the issues between parties were completed and perfected since 2017 and fuelled by the prospect of unexpected substantial financial rewards (LAD) to be extracted from the defendant:

(a) It is my finding, in the circumstances, that they are being aggrieved with the executive decision allowing the EOT in cls. 25 and 27 of the SPAs after ten years had passed, must challenge that decision to quash it by way of judicial review under O. 53 ROC 2012, by seeking an abridgment of time under O. 53 r. 3(7). That legal and procedural mechanism cannot be circumvented or sidestepped. Since the EOT is interlocked with the variation in the impugned clauses, it predominantly involves public law issues;

(b) The heart of the plaintiffs' argument hinges on the said EOT, then it has to be quashed and not evasively by this civil action seeking declaratory orders rendering judicial review meaningless in the circumstances;

(c) For abridgment of time, the Court of Appeal in *Ketua Pengarah Kastam Dan Eksais v. Coach Malaysia Sdn Bhd* [2019] 4 CLJ 454, CA held that one good reason is enough to entitle the applicant to an extension of time. The Privy Council in *Maharaj v. National Energy Corporation of Trinidad and Tobago* [2019] 2 LRC 693, PC observed that the element of prejudice or detriment was relevant in the test for determining a good reason for an abridgment of time to mount a judicial review. The plaintiffs had acknowledged that they were out of time for judicial review in their arguments, but rather than attempting to file an application to enlarge the time by giving cogent and plausible reasons, they elected the easy way out to circumvent that requirement by filing this suit and making untenable assertions that their claim concerns private law issue in seeking the said declaratory orders.

(d) When the wrong mode is used as in the present action, it must, as a matter of course, be struck off: *Majlis Perubatan Malaysia & Anor v. Asia Pacific Higher Learning Sdn Bhd* [2019] 5 CLJ 513; [2019] 1 MLJ 471, CA; *Yahya Kassim v. Kerajaan Malaysia & Anor* [1998] 1 CLJ 43; [1997] 3 MLJ 749, CA;

(e) In *Bludream City Development Sdn Bhd v. Kong Thye & Ors And Other Appeals* (*supra*), the Court of Appeal said that the purchasers were entitled to mount a leave to commence judicial review as soon as becoming aware of the EOT, but did not do so. In the instant case, the status of the EOT in cls. 25 and 27 was made known to the plaintiffs before the execution of the respective SPAs between 2012 to 2013. Claiming complete ignorance of it by the plaintiffs is untenable in the circumstances. Still, they elected to proceed and

never, throughout the construction and completion period, made any challenges to the said EOT in the SPAs, if indeed they are genuinely aggrieved;

(f) This nature of this argument was canvassed and ventilated in *Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd* (*supra*), the High Court held *inter alia*, in a nutshell:

(1) The issue of EOT and the amendment to the impugned clauses are interwound and involve public law issues. Judicial review is required and not a writ action;

(2) The filing of this suit is improper and an abuse of process;

(3) The prayers seeking several declarations on the amendments are flawed and irreparable;

(4) When a litigant uses the court's machinery improperly, the court is vested with ample powers to strike out an irregular proceeding.

(5) Their failure to join the public body as a party gives rise to a violation of natural justice. The right to be heard: *Muhammad Zamri Vinoth Kalimuthu v. Arumugam Dorasamy* [2021] 1 LNS 1229; [2021] MLJU 1472, HC; *Sundram Ramasamy v. Arujunan Arumugam & Anor* [1994] 4 CLJ 300; [1994] 3 MLJ 361, SC;

(g) *Shahizul Helmi Sharani v. Angkatan Tentera Malaysia & Ors* [2017] 1 LNS 1005; [2017] MLJU 832, CA:

[26] We are in full agreement with the observation of Lord Diplock in *O'Reilly v. Mackman* (*supra*) when His Lordship stated at p. 285:

> The position of applicants for judicial review has been drastically ameliorated by the new Ord 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. … Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Ord 53 for the protection of such authorities.

[25] Grounded on the decision in *Leong Keng Chiang v. Prema Bonanza Sdn Bhd* (*supra*), the plaintiffs had argued that a void decision is no decision and does not require any legal challenge to quash it. I am not entirely in agreement with this assertion, in view that: A

(i) It is an established and trite practice in administrative law that an alleged void order or decision will not somehow disappear on its own accord unless removed or quashed; B

(ii) Briggs J in *Badat Drani v. Tan Kheat* [1953] 1 LNS 6; [1953] 1 MLJ 67, had ruled that *certiorari* would issue to quash an order which was voidable but not ordinarily a wholly void order, whereby, in that case, there is nothing to quash; C

(iii) In *R v. Paddington Valuation Officer; ex parte Peachy Property Corp* [1966] 1 QB 380, Lord Denning had observed that if an order was a nullity, there was no need to quash it as it was automatically null and void. Seah SCJ, however, in *Inchcape (M) Holdings Bhd v. RB Gray & Anor* [1985] 2 CLJ 305; [1985] CLJ (Rep) 132; [1985] 2 MLJ 297, SC, left the question of whether or not it is necessary to issue a *certiorari* to quash a void decision open; D

(iv) In *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37; *United Asian Bank Bhd v. Elgi Marka Sdn Bhd* [1995] 1 CLJ 407; [1995] 1 MLJ 301; *London & Clydeside Estates Ltd v. Aberdeen District Council* [1980] 1 WLR 182: Had observed that a void decision is open to collateral attack; E

(v) In *Fairmount Investments Ltd v. Secretary of State for the Environment* [1976] 2 All ER 865; the Court of Appeal in *Chan Kwai Chun v. Lembaga Kelayakan* [2002] 3 CLJ 231; [2002] 3 MLJ 550 observed that a void decision is no decision at all, but in practice, however, *certiorari* is usually granted to quash decisions which are held to be nullities. Whether in a given proceeding a person affected is entitled to be heard or not, and whether natural justice has been infringed or not in reaching a decision are questions that only a court can answer definitively, and *certiorari* is the proper remedy for the purpose; and F G

(vi) In *London & Clydeside Estates Ltd v. Aberdeen District Council* [1980] 1 WLR 182: A void order will not disappear on its own. *Certiorari* is not only a proper but a necessary remedy for setting aside a void decision. See the Privy Council in *Calvin v. Carr* [1979] 2 All ER 440, PC. H

[26] In coming to my findings, I find guidance in: I

(i) Order 53 rr. 1 and 2 ROC 2012:

1. **Application for judicial review** (O. 53, r. 1)

(1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

(2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950 [Act 137].

2. **Applications** (O. 53, r. 2)

(1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form 109.

(2) An application for judicial review may seek any of the reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:

Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision, action, or omission in relation to the exercise of the public duty or function shall be entitled to make the application.

3. **Leave** (O. 53 r. 3)

(1) An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule.

(2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(4) The Judge may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose or when the decision is first communicated to the applicant.

(7) The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.

(8) An application to extend time must be served on all respondents and shall be heard *inter partes.*

(ii) *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296, FC:

[9] An application for judicial review is a particular procedure by which an aggrieved person can seek to review a public authority's decision, with judicial review referring to the power to supervise the activities, inclusive of the latter decision. Express statutory power is vested in the High Court by the Courts of Judicature Act 1964, the Specific Relief Act 1950, and the Rules of High Court 1980 to deal with this supervisory power. The basis of the application will be based on the principles of public law. In a nutshell, and which is relevant to the question for determination, whether an entity is subject to judicial review depends very much on whether its activities are subject to supervision according to rules and principles of public law.

(iii) *Ace Polymers (M) Sdn Bhd v. Ketua Pengarah Lembaga Kemajuan Ikan Malaysia & Ors* [2012] 8 CLJ 440; [2012] 5 MLJ 865, HC:

[22] Even if it can be said that there is a mixture of public and private law, in this case, it is my judgment that the plaintiff's complaints necessarily contain substantial elements of public law. It is difficult to see from the nature of the plaintiff's complaints how their complaints can be matters or issues concerning private law. The claim, therefore, falls squarely within the category of cases that must be brought by way of judicial review.

[23] This is also not a matter of the plaintiff's choice. It is not up to the plaintiff to decide how it wants to challenge the defendants in this regard. These are matters of public law where the specific procedure has been prescribed for such challenges. This rule must be adhered to strictly as it "is in the interest of good administration." Otherwise, as the Federal Court said in *Ahmad Jefri Mohd Jahri*, O. 53 would be rendered "redundant."

(iv) *Jalang Paran & Anor v. Government Of The State Of Sarawak & Anor* [2011] 3 CLJ 469; [2011] 3 MLJ 13, CA:

A It is settled law that matters which had substantial a public law element should be proceeded upon through the mechanism as provide. The Ministerial direction in the instant case was very much in the realm of public law, and any challenge should be pursued through the procedure as laid down by O. 53 of the RHC, for otherwise, it would be rendered redundant

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(v) *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* (*supra*):

[61] Aside from *mandamus*, prohibition, *quo warranto*, and *certiorari*, or any others described under the pre-amended O. 53 of the RHC, an alternative [2010] 3 MLJ 145 at 172 remedy for an aggrieved party seeking relief against a public authority on his infringed right to which he was entitled to protection under public law is for a declaration. The courts had for a long time recognised their power to grant a declaration under common law. But s. 41 of the Specific Relief Act 1950 armed them with the statutory authority to do so. It is also commonly accepted that O. 15 r. 16 of the RHC also provides the High Court with such power (see Lord Diplock's judgment in *O'Reilly v. Mackman*). However, O. 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater to this purpose, then, as a general rule, all such applications for such relief must commence according to what is set down in O. 53 of the RHC otherwise, it would be liable to be struck off for abusing the process of the court.

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(vi) *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia* [2007] 4 MLJ 422, FC:

[47] In another Court of Appeal case of *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia* [2007] 3 CLJ 377, the former Deputy Prime Minister of the country sued the Prime Minister and another by way of an originating summons for a declaration that they had acted in contravention of the Federal Constitution in dismissing him as Deputy Prime Minister and that he is still a Minister in the Malaysian Cabinet. The defendants applied to strike out the plaintiff's claim under O. 18 r. 19(1) RHC. One of the grounds advanced by the defendants was the use of an incorrect procedure; it should be by way of an application for judicial review under O. 53 RHC rather than by originating summons. The High Court allowed this application. Dissatisfied, the plaintiff appealed. His appeal was dismissed by the Court of Appeal, and there Justice Helilah JCA (as she then was) remarked:

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This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such, a decision taken by the Prime Minister with regard to a Minister as a member of the administration in his public duties is one that has implications for the public as a whole, and it is in consequence of this that the public law is concerned with the decision-making process. The legal sources of the powers that are being impugned are in the public domain. As such, to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority, in this case, the Federal Government and in the circumstances of the present case, of the protection of the law that is entitled to by the process available under O. 53.

(vii) *The State Government Of Sabah & Ors v. Clarence Chiuh Ken Loong & Ors* [2017] 2 CLJ 379; [2017] 3 MLJ 127, CA:

[27] We hastened to add that the plaintiff's complaint against the defendants, in this case, ought to have been brought by way of judicial review. The Federal Court in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145 had made clear that a complaint and the procedure to challenge the exercise of statutory powers by public authority has been explicitly provided under O. 53 of Rules of Court High Court 1980 (now O. 53 of Rules of Court 2012). As a general rule, an application for reliefs against public authority, as in the instant case, which involves the question of the proper exercise of the statutory powers of the defendants as a public authority, should have proceeded under that rule. The failure of which should stand the suit liable to be struck out.

(viii) *Shahizul Helmi Sharani v. Angkatan Tentera Malaysia & Ors* [2017] 1 LNS 1005; [2017] MLJU 832, CA:

[15] First, let us consider the legal principles on striking out pleadings and endorsements under O. 18 r. 19 of ROC 2012. There are a plethora of weighty authorities setting out trite principles governing striking out pleadings and endorsements. In *Tan Wei Hong and 4 Others v. Malaysian Airlines System Berhad and 4 Others*, Rayuan Sivil No. W-01(NCVC)(W)-125-04 Tahun 2016, this Court stated:

...

[8] Concerning abuse of process, Supreme Court Practice 1995, P. 344 (Sweet & Maxwell), observed as follows:

This term connotes that the process of the court must be used *bona fide* and properly and must not be abused. The court will prevent improper use of its machinery from being used as a means of vexation and oppression in the process of litigation … The categories of conduct rendering a claim

A frivolous, vexatious, or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose, considerations of public policy and the interests of justice may be very material.

(ix) *Badan Pengurusan Bersama Mahkota Parade v. Pesuruhjaya Bangunan Majlis Bandaraya Melaka Bersejarah* [2016] 1 LNS 1080; [2016] MLJU 610, HC:

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[12] The law is well settled that when a person is aggrieved by the decision of a public body concerning an infringed right protected under public law, then any legal challenge to that decision shall be by way of judicial review and, as a general rule, applications for relief against such decision must be made in accordance to the procedure prescribed in O. 53 of the Rules of Court 2012. Any failure to adhere to this strict procedural requirement would render the application being struck out as an abuse of process. See *YAB Dato' Dr Zambry bin Abdul Kadir & Ors v. YB Sivakumar a/l Varatharaju Naidul (Attorney General Malaysia, intervener* [2009] 4 MLJ 24 FC; *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 FC; *Ahmad Jefri bin Mohd Jahri @ Md Johari v. Pengarah Kebudayaan & Kesenian Johor & Lain* [2010] 3 MLJ 145 FC.

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E (x) *Arab Malaysian Finance Bhd. v. Steven Phoa Cheng Loon & Ors.* [2003] 1 CLJ 585, CA

[36] Thus, the decision to dismiss the appellant was made under a statutory law by a body who acted within the scope of such statutory power. Though this decision involves the dismissal of an employee by an employer, much like a master dismissing his servant, which is a private law matter, the fact that there are statutory conditions and restrictions imposed by the Regulations on the conduct and dismissal of the appellant underpins the public law element in this case. This is not a case of a public authority being delegated with authority to hire and fire, much like what has occurred in *R v. East Berkshire Health Authority, ex parte Walsh and Wenda/Swann v. Attorney General of the Turks and Caicos Islands.* Here, a special statutory provision bearing directly upon the right of a public authority to dismiss the appellant. This injects the element of public law necessary in this context to attract the remedies of administrative law, making this case amenable for judicial review.

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(xi) *TR Rumah Lampoh Dana & Ors v. Government Of Sarawak* [2005] 8 CLJ 705; [2005] 6 MLJ 371:

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[41] Likewise, in this instant case, the plaintiffs were deliberately attempting to circumvent the stringent mandatory requirements of O. 53 by filing this suit to challenge the Ministerial Direction. It would seem so because it is obvious that the plaintiffs were

clearly out of time as regards the 40 days time frame provided by the rules to file for judicial review at the time the suit was filed. Furthermore, the plaintiffs have not obtained any leave, and neither have the plaintiffs applied and granted any extension of time to file for judicial review after the 40 days time limit.

(xii) *Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [2009] 1 CLJ 192; [2009] 1 MLJ 676, CA:

[14] First, we are of the view that the High Court, in deliberating the application, has applied the correct principle of law as set out in *O'Reilly v. Mackman* [1983] 2 AC 237 (and adopted by our courts in *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor* [2007] 4 MLJ 422 at p. 437; [2007] 3 CLJ 377 at p. 397) which is:

... it would as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O. 53 for the protection of such authorities.

[27] In light of the foregoing, it is my considered view that it is sufficient to determine at this juncture that encl. 6 for summary judgment by the plaintiffs is obviously untenable and must be dismissed, but however, encl. 7 for striking out by the defendant grounded on *inter alia* abuse of process satisfies the *Bandar Builder,* SC test, and should be allowed. The action is, in the circumstances, obviously unsustainable. The Court of Appeal in *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285; [2011] 2 MLJ 192, CA, held that an "abuse of the process of the court" arises where the process of the court has not been used in a *bona fide* manner and has been abused: *Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16, SC; *Ng Kian Chong & Ors v. Saw Seng Kee* [1994] 4 CLJ 857:

Frivolous and vexatious

These words relate to cases which are obviously unsustainable as they would amount to an abuse of the Court. The Courts must, in their judicial discretion, determine whether the proceedings are frivolous and vexatious (see *AttorneyGeneral of Duchy of Lancaster v. L & N.W Ry* [1892] 3 Ch. 274). It is now trite law that the Court will not permit a plaintiff to be ousted from the judgment seat, so to speak, except where the cause of action is obviously bad and "almost incontestably bad" (*Dyson v. A.G.* [1911] 1 KB 410). The pleading must, in all the circumstances, be so obviously frivolous that to advance it forward must be an abuse of the process of the Court (*Young v. Holloway* [1895] P 87).

Order 18 r. 19 ROC 2012 is a discretionary power to be exercised by the court according to the justice of the case: *Muniandy Subrayan & Ors v. Chairman And Board Members, Koperasi Menara Maju Bhd* [1997] 1 CLJ 417; [1997] 1 MLJ 557, CA.

[28] On other issues argued by the parties, it is my considered view:

(i) that the plaintiff's claim is barred by limitation, the Court of Appeal agreed with the findings of the High Court in a similar fact case in *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Another Appeal*, holding that:

> [25] We would agree with the Plaintiff/Appellant if the Plaintiff's claim for LAD is simply based on clauses 25 and 27 of the SPAs, where the delivery period of the Properties was agreed/contracted at fifty-four (54) months.
>
> [26] However, the Plaintiff's claim herein is not based on clauses 25 and 27 of the SPAs, which the parties have signed …
>
> [29] Therefore, in gist, on its pleaded case, the Plaintiff's cause of action is that:
>
> (i) that the SPAs were invalid at the time of signing, as the SPAs had failed to comply with the prescribed Schedule H; and
>
> (ii) that the Defendant has breached Schedule H of the HDR 1989 by amending the time delivery of vacant possession from thirty-six(36) months to fifty-four (54) months …
>
> [33] In other words, the Plaintiff is challenging the validity of both clauses 25 and 27 of the SPAs from the date of the signing/execution of the SPAs. This challenge is premised on a breach of Schedule H of the HDR 1989, as interpreted by the Federal Court in *Ang Ming Lee* (*supra*). The Plaintiff is therefore challenging the validity of the purported amendment to clauses 25 and 27 of the SPAs from the inception or execution of the SPAs. The contractual breach that the Plaintiff is complaining about is the purported amendment to clauses 25 and 27 of the SPAs (see *Nasri v. Mesah*). Since the Plaintiff is challenging both clauses 25 and 27 of the SPAs from the inception or execution of the SPAs, then the Plaintiff's cause of action runs from the date of the execution of the SPAs, that is, on 11.7.2012 and 18.7.2012, respectively.
>
> [34] Therefore, we agree with the learned Judge that the Plaintiff's claim is barred by limitation, as the six (6) year period had expired on 10.7.2018 and 17.6.2018, respectively. Since this suit was filed on 18.6.2020, the limitation has already set in.

Stare decisis dictate that I am bound by the above Court of Appeal's decision and will rule accordingly on this limitation issue. In *Alias Ismail v. Hairuddin Mohamad & Anor* [1997] 4 CLJ 669; [1997] 3 MLJ 724, CA, held:

> The court has no discretion to set aside a defence of limitation. In *Riches v. Director of Public Prosecutions* [1973) 1 WLR 1019, it was held that it was open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of the process of the court to show that the plaintiff's cause of action was statute-barred and must inevitably fail for that reason. This had been followed by the Federal Court in *Tio Chee Hing & Ors v. Government of Sabah* [1981] 1 MLJ 207 and *Haji Hussin bin Haji Ali & Ors v. Datuk Haji Mohamed bin Yaacob & Ors; and connected cases* [1983] 2 MLJ 227.

In *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663, FC held:

> Likewise, in the present action, it was clear that the appellants would rely on limitations, and there was no way that the respondents could have escaped from it. Thus, a defendant on an application to strike out pleadings and indorsements under O. 18 r. 19(1) of the RHC is entitled to raise the limitation of action without pleading a defence and filing it to that effect. Similarly, in the present case, the appellants were entitled to do the same, and since the respondents' action was clearly statute barred, the action was therefore properly struck out.

In *Parkson Corp Sdn Bhd v. Fazaruddin Ibrahim (t/a Perniagaan Fatama) & Another Appeal* [2011] 2 MLJ 46, CA held:

> [25] The case before us was even stronger. The applications under O. 18 r. 1 9(1)(a), (b), (c), or (d) of the RHC were made after the appellant had entered its defence and specially pleaded that the respondent's action was statute-barred. The respondents pleaded case that the alleged acts of infringement took place between December 1987 and June 1994. The appellant, in its defence, stated that it had ceased using the trademark in 1994, a fact which was never disputed by the respondent. The last alleged act of infringement was in June 1994. This action was filed on 6 May 2004, which was well outside the period of limitation the action is clearly statute-barred and ought to be struck out under O. 18 r. 19(1)(b) and (d) of the RHC.

(ii) It is also my finding that the plaintiffs had failed to comply with the requirements of a representative action in O. 15 r. 12 ROC 2012: that where numerous persons have the same interest in any proceedings, the proceeding may be begun by or against any one or more of them. As held in *Re Tong Tai Holdings Sdn Bhd* [2003] 6 CLJ 170; [2003] 5 MLJ 450, HC, apart from the three legal requirements:

(a) The plaintiffs must have a common interest (*QB Khidmat Teguh Sdn Bhd v. Pembinaan Legenda Unggul Sdn Bhd & Anor* [2016] 1 LNS 1447; [2017] 8 MLJ 376);

(b) The plaintiffs must have a common grievance (*Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 1 LNS 114; [2010] 4 MLJ 204); and

(c) The relief sought by the plaintiffs must be beneficial to all (*Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors* [1986] 1 LNS 124; *Voon Keng & Ors v. Sykt Muzwina Development Sdn Bhd* [1990] 1 CLJ 1010; [1990] 3 CLJ (Rep) 329).

In the present suit, the plaintiffs had entered into separate SPAs; therefore, none of them can represent each other in their contracts, even if the agreement is similar. *Tan Poh Yee v. Tan Boon Thien & Other Appeals* [2017] 3 CLJ 569; [2017] 3 MLJ 244, CA, had reaffirmed the position. There is also no indication in the intitule or body of this suit that it is intended as a representative action which in this case would be fatal.

(iii) The High Court in *Alpine Return Sdn Bhd v. Matthew Ng Hock Sing & Ors* [2022] 1 CLJ 120; [2021] MLJU 1923, HC, in determining the issue of EOT (36 to 60 months), held that estoppel applies to prevent the purchasers from denying the terms in the SPA. I agree, and it is my considered view that since the amendment to the period of delivery was allowed by the governing authorities responsible in the housing industry, parties in the instant case had elected to proceed with the SPAs notwithstanding the norm in Schedule H, HDR 1989, in 2012 to 2013, *ie*, seven/eight years before *Ang Ming Lee*, FC. Grounded on that mutually agreed conduct with no evidence to suggest otherwise led to the execution of the SPAs. Applying the principle of the Court of Appeal in *Bousteadt Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331, CA that the court needs to recognise the doctrine of estoppel to the circumstances of the case in achieving justice. In the circumstances, the plaintiffs are estopped from denying the completion period of 54 months. The Federal Court had ruled that a party who represented that he will not insist upon his strict rights under contract 1995 will not be allowed to resile from that position unless reasonable prior notice is given: *Sim Siok Eng v. Government Of Malaysia* [1977] 1 LNS 116; [1978] 1 MLJ 15, FC. It is trite that a party cannot be allowed in equity to renege on a promise when through his action it had led the other to believe that he would not insist on his strict legal rights: *Birmingham Land Company v. London And North Western Railway Company* [1886 B.571], (1888) 40 Ch. D 268; and

(iv) It is also my view that the plaintiffs in the instant case who had elected to execute the settlement agreements or letters with the defendant voluntarily must be deemed to have waived their right under the

Contracts Act 1950 and cannot be allowed to resile from that bargain. It would be abusive and unjust in the circumstances to allow it unless there are legitimate vitiating factors in play. A promisee may dispense with or remit performance of a promise: Section 64 Contracts Acts 1950; applied by the Supreme Court in *Associated Pan Malaysia Cement Sdn Bhd v. Sykt Teknikal & Kejuruteraan Sdn Bhd* [1990] 2 CLJ 913; [1990] 1 CLJ (Rep) 15; [1990] 3 MLJ 287.

Conclusion

[29] For summary judgment, after careful consideration of the facts, all-cause papers and respective submissions of parties, I find the plaintiffs has failed to prove their case and the defendant has shown satisfactorily to the court a meritorious defence to this suit. And for the striking out application, I find for the defendant and in coming to this conclusion, I am minded of the legal position that the suit before me must be hopeless, baseless, or without foundation in law or equity or otherwise, an abuse of the process of the court before it can be struck out. I find this suit by the plaintiffs is obviously unsustainable, and I accordingly ordered that it be struck out against the defendant. In the premise:

(i) Enclosure 6 for summary judgment: Is dismissed with costs of RM5,000 to be paid within 14 days, and

(ii) Enclosure 7 for striking out: Order in terms of prayers 1 and 2 with global costs of RM5,000 to be paid within 14 days.